

# THE INDIAN LAW REPORTS.

## ALLAHABAD SERIES,

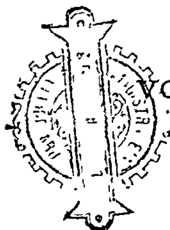
CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.


REPORTED BY:

Privy Council ... J. V. WOODMAN, *Middle Temple.*

High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*

VOL. XXXII.

1910.


ALLAHABAD:

PRINTED BY F. LUKER, SUPERINTENDENT, GOVERNMENT PRESS,

AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT,

UNDER THE AUT— [illegible]

# THE INDIAN LAW REPORTS.

*Published in FOUR SERIES, viz.—*

CALCUTTA, MADRAS, BOMBAY AND ALLAHABAD.

---

The Indian Law Reports, published under the authority of the Governor General [illegible] are printed in monthly parts, which are issued, as soon as possible after the first of each [illegible], Madras, Bombay and Allahabad, respectively.

The reports comprise four series—one for the Calcutta High Court, a second for the [illegible] Court, a third for the Bombay High Court and a fourth for the Allahabad High Court.

The cases heard by the Privy Council on appeal from each High Court are reported in [illegible] for that High Court. Cases heard by the Privy Council on appeal from Provinces in India [illegible] any High Court are reported in the Calcutta Series.

The [illegible] distributed by the Bengal Secretariat Book Depôt; and the Madr[illegible] and Allahabad [illegible] are distributed direct from Madras, Bombay and Allahabad, respective[illegible]

*[illegible] desiring to subscribe for or purchase the reports should apply to—*

[illegible]

[illegible]

[illegible]

THE CURATOR OF GOVERNMENT BOOKS, United Provinces, Allahabad.

PRICES.

The terms of subscription and the terms on which current issues and back numbers [illegible] as follows—

| | | | Without postage | With Indian postage | With [illegible] |
|---|---|---|---|---|---|
| | | | Rs. a. p. | Rs. a. p. | R[illegible] |
| [illegible] Series— | | | | | |
| Current issues per annum | ... | ... | — | 22 8 0 | [illegible] |
| Back numbers per annum | | ... | 20 0 0 | 22 8 0 | [illegible] |
| Calcutta Series— | | | | | |

## List of Books and Publications for sale which are less than two years old

### LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, 8, Hastings Street, Calcutta.]

THE PRICES OF THE GENERAL ACTS, LOCAL CODES, MERCHANT SHIPPING, DIGEST INDEX TO ENACTMENTS AND THE DIGESTS OF INDIAN LAW CASES 1901 TO 1907 (SEPARATELY AND PER SET OF FIVE VOLUMES) HAVE BEEN CONSIDERABLY REDUCED

THE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPARTMENT

### I.—*THE INDIAN STATUTE BOOK*

REVISED EDITION

*Super royal 8vo cloth lettered*

#### B.—GENERAL ACTS

| | |
|---|---|
| General Acts of the Governor General of India in Council, Vol I from 1834 to 1867, Edition 1909 .. | Rs 6 (10 *a*) |
| General Acts of the Governor General in Council, Vol II, from 1868 to 1878 Edition 1909 | Rs 7 (10 *a*) |
| General Acts of the Governor General in Council, Vol III, from 1879 to 1886 Edition 1909 | Rs 6 (9 *a*) |
| General Acts of the Governor General in Council, Vol IV, from 1887 to 1897, Edition 1909 | Rs 6 (9 *a*) |
| General Acts of the Governor General in Council, Vol V, from 1898 to 1903 Edition 1909 | Rs 6 (9 *a*) |
| General Acts of the Governor General in Council, Vol VI, from 1904 to 1908 Edition 1909 | Rs 7 (12 *a*) |

#### C.—LOCAL CODES

The Bengal Code. Third Edition, 1905, containing the Regulations and Local Acts in force in Bengal Vols I to V Rs 6 a volume or Rs 30 Reduced to Rs 20 for set of 5 Vols

Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1909 ... Rs. 1-2-0. (3 a.)

Act V of 1870 (Unclaimed Deposits), as modified up to 1st October, 1905 ... 1 a. (1 a.)

Act VII of 1870 (Court-Fees), as modified up to 1st February, 1909 ... Rs. 1-2-0. (3 a.)

Act XXIII of 1871 (Pensions), as modified up to 1st September, 1909 ... 3 a. 3 p. (1 a.)

Act XXVII of 1871 (Criminal Tribes), as modified up to 1st October, 1905 ... 5 a. 6 p. (1 a. 6 p

Act I of 1872 (Evidence), as modified up to 1st May, 1908 ... Re. 1. (2 a.)

Act IX of 1872 (Contract), as modified up to 1st February, 1908 Re. 1. 4 a. (2 a.)

Act IX of 1874 (European Vagrancy), as modified up to 1st September, 1909 ... 6 a 0 p. (1 a.)

Act I of 1878 (Opium), as modified up to 1st October, 1907 .. 5 a. 0 p. (1 a.)

Act VI of 1878 (Treasure Trove), as modified by Act XII of 1891, as reprinted on the 14th February, 1909 ... 2 a. 0 p. (1 a.)

Act VIII of 1878 (Sea Customs), as modified up to 1st June, 1908 .. Re. 1-5-3. (4 a.)

Act XI of 1878 (Arms), as modified up to 1st March, 1910 ... 6 a (1 a.)

Act XVI of 1879 (Transport of Salt), as modified up to 1st October, 1907 ... 1 a 6 p. (1 a.)

Act XIII of 1880 (Vaccination), as modified up to 1st September, 1909 ... 4 a. 9 p. (1 a.)

Act XV of 1881 (Factories) as modified up to 1st April, 1910 ... 5 a. 6 p. (1 a. 6 p.)

Act XVIII of 1881 (*Central Provinces Land-revenue*), *as modified* up to 1st March, 1909 ... Rs. 1-2-0. (3 a.)

Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September, 1909 ... 10 a. (1 a.)

Act II of 1882 (Indian Trusts), as modified up to 1st June, 1909 ... 10 a. (1 a.)

Act XII of 1882 (Salt), as modified up to 1st August, 1909... ... 7 a. (2 a.)

Act V of 1883 (Indian Merchant Shipping), as modified up to 1st September, 1909 ... 6 a. (1 a.)

Act IV of 1884 (Explosives), as modified up to 1st September, 1908 ... 4 a. (9 p.) (1 a.)

Act IX of 1884 (Legal Practitioners), as modified up to 30th June, 1909 1 a. 6 p. (1 a.)

Act III of 1888 (Police), as modified up to 1st January, 1909 ... 1 a. 9 p. (1 a.)

Act II of 1889 (Measures of Length), with footnotes ... 1 a. 3 p. (1 a.)

*Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st* August, 1908 ... 6 a. (1 a.)

Act VI of 1889 (Probate and Administration), as modified up to 1st January, 1909 ... 2 a. 0 p. (1 a.)

Act VI of 1890 (Charitable Endowments), as modified up to 1st August, 1908 ... 2 a. 6 p. (1 a.)

Act IX of 1890 (Indian Railways) as modified up to 1st June, 1909 ... Re. 1-2-0 (2 a.)

Act XI of 1890 (Prevention of Cruelty to Animals), with foot notes ... 2 a. (1 a.)

Act XIII of 1890 (Excise Malt Liquors), as modified up to 1st October, 1908 ... 1 a. 6 p. (1 a.)

Act X of 1891 (Indian Penal Code Amendment), as modified up to 1st August, 1909 ... 1 a. (1 a.)

Act XII of 1895 (Indian Companies Memorandum of Association) as modified up to 1st August, 1909 ... 2 a. (1 a.)

Act III of 1898 (Lepers), as modified up to 1st September, 1909 ... 4 a. (1 a.)

Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August, 1909 ... Rs. 3-10 a. (8 a.)

Act VIII of 1899 (Petroleum), as modified up to 1st January, 1909 ... 7 a. (1 a.)

Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February,

| | |
|---|---|
| Act VI of 1900 [[illegible]] as [illegible] up to 1st August 1905 ... | In Urdu 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| Act XII of 1[illegible] ([illegible]) as [illegible] up to 1st March 190[illegible] | In Urdu [illegible] a 9 p (2 a) |
| Ditto [illegible] | In Nagri 3 a 3 p (2 a |
| Act XIII of 1[illegible] ([illegible]) as [illegible] up to 1st February 1[illegible] | In Urdu 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| Act I of 1[illegible] [illegible] (Amendment)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act III of 19[illegible] (Coinage) | In Urdu 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| Act V of 1906 (Stamp Amendment) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act III of 1907 (Provincial Insolvency) | In Urdu 1 a 6 p (1 a |
| Ditto | In Nagri 1 a 6 p (1 a |
| Act IV of 1907 [Repealing and Amending (Rates and Cesses)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act V of 19[illegible] (Local Authorities Loan) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act VI of 1907 (Prevention of Seditious Meetings) .. | In Urdu 3 p (1 a) |
| Ditto ditto .. | In Nagri 3 p (1 a) |
| Act I of 1908 (Legal Practitioners) .. | In Urdu 3 p (1 a) |
| Ditto ditto ... | In Nagri 3 p (1 a) |
| Act II of 1908 (Tariff) ... | In Urdu 3 p (1 a) |
| Ditto | In Nagri 3 p (1 a) |
| Act III of 1908 [Indian Trusts Amendment] .. | In Urdu 3 p (1 a) |
| Act V of 1908 (Code of Civil Procedure) | In Urdu Rs 1 2 (6 a) |
| Ditto ditto .. | In Nagri Rs 1 2 (6 a |
| Act VI of 1908 (Explosives Substances) .. | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act VII of 1908 (Incitements to Offences) | In Urdu 3 p (1 a) |
| Ditto ditto .. | In Nagri 3 p (1 a) |
| Act IX of 1908 (Limitation) | In Urdu 2 a (1 a) |
| Ditto ditto .. | In Nagri 2 a (1 a) |
| Act X of 1908 (Salt Duties) .. | In Urdu 3 p (1 a) |
| Ditto | In Nagri 3 p (1 a) |
| Act XI of 1908 (Assam Labour and Emigration) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (2 a) |
| Act XIV of 1908 [Indian Criminal Law (Amendment)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act XVI of 1908 (Indian Registration) | In Urdu 2 a (2 a) |
| Ditto ditto | In Nagri 2 a (2 a) |
| Act XVII of 1908 (Indian Emigration) .. | In Urdu 2 a 3 p (2 a) |
| Ditto ditto .. | In Nagri 2 a 3 p (2 a) |
| [Act I of 1909 (Indian Steamship Law Amendment)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act IV of 1909 (Whipping) | In Urdu 3 p (1 a) |
| Ditto | In Nagri 3 p (1 a) |
| Act V of 1909 [Amending (Army Act)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act VII of 1909 (Anand Marriage) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |

| | |
|---|---|
| Act XII of 185 (Legal Representatives Suits) as modified up to 1st November 1904 | 1 a (1 a) |
| Act XIII of 1855 (Fatal Accidents) as modified up to 1st December 1903 | 2 a (1 a) |
| Act XXVIII of 1855 (Usury Laws Repeal) as modified up to 1st December, 1903 | 1 a 6 p (1 a) |
| Act XX of 1856 (Bengal Chaukidars), as modified up to 1st November, 1903 | 7 a (1 a) |
| Act IV of 185 [Tobacco, (Bombay Town)] as modified up to 1st December, 1906 | 3 a 9 p (1 a) |
| Act XXIX of 1857 (Land Customs Bombay) as modified up to 1st December 1895 | 4 a (1 a) |
| Act III of 1858 (State Prisoners) as modified up to 1st August, 1897 | 2 a (1 a) |
| Act XXXIV of 1858 [Lunacy (Supreme Courts)] as modified up to 30th April 1903 | 4 a 3 p (1 a) |
| Act XXXV of 1858 [Lunacy (District Courts)] as modified up to 30th April 1903 | 2 a 3 p (1 a) |
| Act XXXVI of 1858 (Lunatic Asylums) as modified up to 31st May, 1902 | 5 a (1 a) |
| Act I of 1859 (Merchant Shipping) as modified up to 30th June 1905 | 13 a (2 a) |
| Act XI of 1859 (Bengal Land Revenue Sales) as modified up to 1st August 1903 | 4 a (1 a) |
| Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874 | 1 a 6 p (1 a) |
| Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December 1904 | 1 a 6 p (1 a) |
| Act XXI of 1860 (Societies Registration) as modified up to 1st December, 1904 | 2 a 9 p (1 a) |
| Act XLV of 1860 (Indian Penal Code) as modified up to 1st April 1903 with an Index | Rs 2 8 (5 a) |
| Act V of 1861 (Police) as modified up to 7th March 1903 | 7 a 6 p (1 a 6 p) |
| Act XVI of 1861 (Stage carriages) as modified up to 1st February 1898 | 3 a 0 p (1 a) |
| Act XXIII of 1863 (Claims to Waste lands) as modified up to 1st December 1896 | 4 a 9 p (1 a) |
| Act III of 1864 (Foreigners) as modified up to 1st September 1903 | 3 a 0 p (1 a) |
| Act XVII of 1864 (Official Trustees) as modified up to 1st July 1903 | 5 a 6 p (1 a) |
| Act III of 1865 (Carriers) as modified up to 31st May 1903 | 3 a (1 a) |
| Act III of 1867 (Gambling) as modified up to 1st January 1905 | 4 a (1 a) |
| Act XX of 1869 (Volunteers) as modified up to 1st May 1896 | 4 a 9 p (1 a) |
| Act I of 1871 (Cattle Trespass) as modified up to 1st May 1900 | 6 a (1 a) |
| Act III of 1872 (Special Marriages) as modified up to 1st November 1903 | 4 a 6 p (1 a) |
| Act IV of 1872 (Punjab Laws) as modified up to 1st November 1904 | [illegible] a (1 a) |
| Act XV of 1872 (Christian Marriage) as modified up to 1st December, 1904 | 10 a (2 a) |
| Act V of 1873 (Government Savings Bank) as modified up to 1st April, 1903 | 3 a 6 p (1 a) |
| Act X of 1873 (Oaths) as modified up to 1st February 1903 | 3 a 9 p (1 a) |
| Act II of 1874 (Administrator General) as modified up to 1st July 1903, with a list of Statutes held within the Local limits of Bengal, Madras and Bombay respectively for the purposes of the Act | 11 a (2 a) |
| Act XIV of 1874 (Scheduled Districts) as modified up to 1st October 1903 | 6 a (1 a) |

Act XV of 1874 (Laws Local Extent), as modified up to 1st October 1875 ... ... ... ... ... ... 7 a. (1 a.)
Act IX of 1875 (Indian Majority), as modified up to 1st May, 1906 ... 2 a. (1 a.)
Act XI of 1876 (Presidency Banks), as modified up to 1st March, 1907 ... ... ... ... ... ... 11 a. (2 a.)
Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ... 11 a. (1 a. 6 p.)
Act VII of 1878 (Forests), as modified up to 1st December, 1903 ... 10 a. (2 a.)
Act XVII of 1878 (Ferries), as modified up to 1st June, 1902 ... 6 a. (1 a. 6 p.)
Act XVII of 1879 (Dekkhan Agriculturists' Relief), as modified up to 1st June, 1905 ... ... .. ... ... 10 a. (2 a.)
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1906 ... ... ... .. ... 7 a. 6 p. (1 a.)
Act VII of 1880 (Merchant Shipping), as modified up to 15th October, 1901 ... ... ... ... ... 10 a. (2 a.)
Act V of 1881 (Probate and Administration), as modified up to 1st July, 1890 ... ... ... ... ... 12 a. (2 a.)
Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1905 .. ... ... ... ... ... 15 a. (2 a.)
Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891) ... ... ... 8 a. (1 a.)
Act VI of 1882 (Companies), as modified up to 1st August, 1906 ... Rs. 1-10. (3 a.)
Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1906 ... ... ... ... 10 a. (2 a.)
Act VIII of 1883 (Little Cocos and Preparis Islands Laws), as modified up to 1st October, 1902 ... ... ... ... 1 a. 3 p. (1 a.)
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ... ... ... ... ... 2 a. 6 p. (1 a.)
Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891 ... ... ... ... ... 9 a. (2 a.)
Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890 ... 6 a. (1 a.)
Act XII of 1884 (Agriculturists' Loans), as modified up to 1st February, 1903 ... ... ... ... ... 2 a. (1 a.)
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ... ... .. ... ... ... 7 a. (1 a.)
Act XIII of 1885 (Indian Telegraph), as modified up to 1st March, 1905 ... ... ... ... ... ... 5 a. (1 a.)
Act II of 1886 (Income-tax), as modified up to 1st April, 1903 ... 8 a. (1 a. 6 p.)
Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st June, 1891 ... ... ... ... 6 a. (1 a.)
Act XI of 1886 (Tramways), as modified up to 1st December, 1903 ... 9 a. (2 a.)
Act XIII of 1886 (Securities), as amended by Act XII of 1891 ... 2 a. 9 p (1 a.)
Act VII of 1887 (Suits Valuation), as modified up to 1st October, 1904 ... .. ... ... ... ... 1 a. 9 p (1 a.)
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900 ... ... ... ... ... 6 a. (1 a.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ... ... ... ... ... ... 8 a. (1 a.)
Act V of 1888 (Inventions and Designs), as modified up to 1st July, 1903 ... ... .. ... .. ... 9 a. (2 a)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ... 1 a. 9 p. (1 a)
Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903 ... ... ... ... ... 5 a 6 p (1 a.)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 ... 7 a. (1 a)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 ... 3 a. (1 a)
Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 19[illegible]

Act XII of 1891 (Repealing and Amending Act, showing the Schedules as modified up to 31st May, 1902) .. ... ... 12 *a*. (1 *a*. 6 *p*)

Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act 1897 .. .. .. 1 *a* 3 *p* (1 *a*)

Act I of 1894 (Land Acquisition), with footnotes ... . 7 *a* (1 *a*)

Act VIII of 1894 (Tariff) as modified up to 1st February, 1906 . 9 *a* (2 *a*)

Act IX of 1894 (Prisons) as amended by the Burma Laws Act, 1898 . 7 *a* 6 *p* (1 *a* 3 *p*)

Act XII of 1896 (Excise), as modified up to 1st March, 1907 8 *a* (2 *a*)

Act IX of 1897 (Provident Funds) as modified up to 1st April, 1903 1 *a*. 6 *p* (1 *a*)

Act II of 1899 (Stamps) as modified up to 1st March 1907 1 *e* 1 (2 *a*)

Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 1 *a* (1 *a*)

Act III of 1900 (Prisoners), as modified up to 1st March, 1905 6 *a* 6 *p* (1 *a*)

Act XV of 1903 (Extradition), as modified up to 1st December, 1904 5 *a* 6 *p* (1 *a*)

Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 . . 6 *a* 6 *p* (1 *a*)

Regulations V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 ... ... 1 *a* 9 *p* (1 *a*)

Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... . 5 *a* 6 *p* (1 *a*)

Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894 . .. 13 *a* (2 *a*)

Regulation VI of 1886 (Ajmere Rural Boards), as modified up to 1st February 1897 ... ... . 5 *a* 6 *p* (1 *a*)

Regulation V of 1893 (Sonthal Parganas Justice) as modified up to 1st October, 1899 .. ... .. 4 *a* 9 *p* (1 *a*)

Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902 . .. .. . 6 *a* (1 *a*)

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COU AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1906

Regulations made under the Statute 33 Vict, Cap 3, from No II of 1875 to 1906 8vo Stitc

[The above may be obtained separately The price is noted on each ]

## IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENEI OF INDIA IN COUNCIL.

Act X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1903, with footnotes brought down to 1st December 1904 .. .. .. ... ... .. In Urdu 2 *a* 6 *p* (

Act XX of 1847 (Copyright), as modified up to 1st May, 1896 ... In Urdu 1 *a* 3 *p* (

Ditto ditto ... In Nagri 1 *a* 3 *p*

Act XVIII of 1850 (Judicial Officers' Protection), with footnotes . In Urdu 6 *p* (1 *a*)

Ditto ditto ... In Nagri. 6 *p*. (1 *a*

Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903 In Urdu, 6 *p* (1 *a*

Ditto ditto ... In Nagri 6 *p* (1 *a*

Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902 ... ... ... ... .. ... In Urdu 6 *p* (1 *a*)

Ditto ditto .. In Nagri 6 *p* (1 *a*

Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904 ... . ... ... In Urdu 3 *p* (1 *a*)

Ditto ditto ... In Nagri 3 *p* (1 *a*

Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903 ... ... ... ... ... .. In Urdu, 6 *p* (1 *a*)

Ditto ditto ... In Nagri. 6 *p* (1 *a*

| | |
|---|---|
| Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1903 .. .. .. .. .. | In Urdu and Nagri 3 p each (1 a) |
| Act XV of 1856 (Hindu Widows' Re marriage) ... ... ... | In Urdu 6 p (1 a) |
| Ditto ditto . | In Nagri. 6 p (1 a) |
| Act XX of 1856 (Police Chaukidars), as modified up to 1st November, 1903 ... .. — ... | In Urdu 2 a 6 p (1 a) |
| Ditto ditto .. | In Nagri 2 a 6 p (1 a.) |
| Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 .. . ... .. ... | In Urdu. 1 a. (1 a.) |
| Ditto ditto ... | In Nagri. 1 a (1 a) |
| Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903 ... .. . ... ... | In Urdu. 1 a (1 a) |
| Ditto ditto .. | In Nagri. 1 a (1 a) |
| Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902 .. ... .. ... .. ... | In Urdu. 1a. 6p. (1 a) |
| Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874 .. ... .. ... | In Urdu. 3p (1 a) |
| Ditto ditt ... | In Nagri. 8p (1a.) |
| Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904 ... ... ... .. | In Urdu 3p (1 a) |
| Ditto ditto .. | In Nagri. 8p (1 a) |
| Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903 ... | In Urdu Re 1 5 (5 a) |
| Ditto ditto .. | In Nagri. Re 1 5 (5 a) |
| Act V of 1861 (Police), as modified up to 7th March, 1903 . | In Urdu. 2 a 9 p (1 a) |
| Ditto ditto ... | In Nagri. 2 a 9 p. (1 a) |
| Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898 | In Urdu. 1 a 3 p. (1 a) |
| Ditto ditto .. | In Nagri 1 a 3 p. (1 a) |
| Act III of 1864 (Foreigners), as modified up to 1st September, 1900 ... | In Urdu 1 a (1 a) |
| Ditto ditto .. | In Nagri 1 a (1 a) |
| Act III of 1865 (Carriers), modified up to 31st May, 1903 ... | In Urdu 9 p (1 a) |
| Ditto ditto ... | In Nagri 9 p (1 a) |
| Act III of 1867 (Gambling), as modified up to 1st December, 1896 ... | In Nagri 1 a 3 p (1 a) |
| Ditto ditto 1st January, 1905 ... | In Urdu. 1 a (1 a) |
| Act V of 1869 (Indian Articles of War), as modified up to 1st January 1895 ... ... ... .. ... ... | In English, Urdu and Nagri Bound Rs 3. (5 a.) |
| Ditto ditto . | Unbound Rs 2 8 (5 a) |
| Act I of 1871 (Cattle-trespass), as modified up to 1st December, 1903 | In Urdu 1 a 9 p. (1 a) |
| Ditto ditto .. | In Nagri 1 a 9 p (1 a.) |
| Act XXIII of 1871 (Pensions) ... ... ... . | In Urdu. 9 p. (1 a) |
| Ditto ... .. . .. | In Nagri 9 p (1 a) |
| Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904 .. | In Urdu 2 a 6 p (1 a 6 p) |
| Act IX of 1872 (Contract), as modified up to 1st September, 1899 .. | In Urdu 9 a 9 p (3 a) |
| Ditto ditto . | In Nagri 9 a. 6 p (3 a) |
| Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 .. ... ... ... . . | In Urdu 4 a (2 a) |
| Ditto ditto .. | In Nagri. 4 a (2 a.) |
| Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903 .. ... ... .. ... .. | In Urdu. 9 p (1 a) |
| Ditto ditto . . , | In Nagri 9 p (1 a) |
| Act VIII of 1873 (Northern) India Canal and Drainage), as modified up to 15th July, 1899 ... ... . ... | In Urdu 3 a 3 p (1 a) |
| Ditto ditto . | In Nagri 3 a 3 p (1 |
| Act X of 1873 (Oaths), as modified up to 1st February, 1903 . | In Urdu 1 a 1 a |
| Ditto ditto .. | In N (1 |

Act XVI of 1873 (Village and Road Police, United Provinces) . In Urdu 1 a (1 a)
Act IX of 1874 (European Vagrancy) .. ... In Urdu 2 a (1 a)
Act IX of 1875 (Majority), as modified up to 1st May, 1905 In Urdu 3 p (1 a)
Ditto ditto ... In Nagri. 3 p (1 a)
Act XI of 1876 (Presidency Banks), as modified up to 1st March, 1906 . ... ... ... ... . In Urdu 3 a 9 p (1 a 6 p)
Ditto ditto ... In Nagri 3 a 6 p (1 a 6 p)
Act XVIII of 1876 (Oudh Laws) ... ... ... ... In Urdu 2 a (1 a)
Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ... In Urdu 4 a 6 p (1 a. 6 p)
Ditto ditto ... In Nagri 4 a 6 p. (1 a 6 p)
Act I of 1878 (Opium), as modified up to 1st December, 1896 .. In Nagri. 1 a 6 p (1 a.)
Act VII of 1878 (Forests), as modified up to 1st December, 1903 ... In Urdu 4 a (1 a 6 p)
Ditto ditto ... In Nagri 4 a. (1 a 6 p)
Act XI of 1878 (Arms), as modified up to 1st May, 1904 ... In Urdu 2 a. (1 a)
Ditto ditto .. ... In Nagri. 2 a (1 a)
Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902 ... ... ... ... ... ... In Urdu 2 a. (1 a)
Ditto ditto . In Nagri. 2 a. (1 a)
Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896 ... ... . ... ... In Urdu. 2 a 6 p (1 a)
Ditto ditto ... In Nagri 2 a 6 p (1 a)
Act XV of 1881 (Factories), as modified up to 1st April, 1891 ... In Urdu. 1 a 6 p (1 a)
Ditto ditto ... In Nagri 1 a 6 p (1 a)
Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to the 1st November, 1898 ... ... In Urdu 9 a (1 a 6 p)
Ditto ditto ... In Nagri. 9 a (1 a 6 p)
Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900 ... ... ... ... ... ... In Urdu. 6 a 9 p. (2 a)
Ditto ditto .. In Nagri. 6 a 9 p. (2 a)
Act VI of 1882 Companies), as modified up to 1st August, 1906 .. In Urdu. 13 a 9 p. (3 a)
Ditto ditto ... In Nagri 1s a. (3 a)
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ... ... ... ... In Urdu 1 a (1 a)
Ditto ditto ... In Nagri. 1 a (1 a)
Act IV of 1884 (Explosives), as modified up to 1st May, 1896 .. In Urdu. 1 a 3 p (1 a)
Ditto ditto ... In Nagri. 1 a. 3 p (1 a)
Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1891 .. ... ... ... ... ... In Urdu 3 a. 6 p (1 a 6 p)
Ditto ditto ... In Nagri. 3 a 6 p (1 a 6 p)
Act XII of 1884 (Agriculturists Loans), as modified up to 1st September, 1906 ... ... .. .. .. ... In Urdu. 6 p (1 a)
Ditto ditto ... In Nagri 6 p. (1 a)
Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ... .. . ... ... In Urdu 2 a 6 p (1 a.)
Act II of 1885 (Negotiable Instruments Amendment) ... ... In Urdu. 9 p (1 a)
Act III of 1885 (Transfer of Property Amendment) ... ... In Urdu 3 p. (1 a)
Act X of 1885 (Oudh Estates Amendment) . ... ... In Urdu. 3 p. (1 a)
Act XIII of 1885 (Telegraphs), as modified up to 1st March 1905 .. In Urdu 1 a 9 p (1 a)
Act XXI of 1885 (Madras Civil Courts Amendment) .. .. In Urdu 3 p (1 a)
Act II of 1886 (Income-tax), as modified up to 1st April, 1903 ... In Urdu. 3 a. (1 a 9 p.)
Ditto ditto ... In Nagri. 3 a (1 a 9 p)
Act IV of 1886 (Amending Section 265 of Contract Act) ... In Urdu. 3 p (1 a)
Act VI of 1886 (Births, Deaths and Marriage Registration) .. In Urdu 1 a 3 p (1 a.)
Act X of 1886 (Criminal Law Amendment) . .. In Urdu 9 p (1 a)
Act XI of 1886 (Tramways), as modified up to 31st December, 1900 . In Urdu 3 a 3 p (1 a)
Ditto ditto ... In Nagri. 3 a. 9 p (1 a.)

| | |
|---|---|
| Act XIII of 1886 (Securities) as amended by the Repealing and Amending Act 1891 | In Urdu 9p (1a) |
| Ditto ditto | In Nagri 9p (1a) |
| Act VI of 1887 (Companies Amendment) | In Urdu 3p (1a) |
| Act VII of 1887 (Suits Valuation) | In Urdu 9p (1a) |
| Act IX of 1887 (Provincial Small Cause Courts) as modified up to 1st December 1906 .. | In Urdu 2a 3p (1a) |
| Ditto ditto | In Nagri 2a 6p (1a) |
| Act X of 1887 (Native Passenger Ships) | In Urdu 1a 6p (1a) |
| Act XII of 1887 (Bengal North West Provinces and Assam Civil Courts) | In Urdu 1a 3p (1a) |
| Ditto ditto | In Nagri 1a 3p (1a) |
| Act XIV of 18 (Indian Marine) as modified up to 15th February 1899 | In Urdu 3a 6p (1a) |
| Ditto ditto | In Nagri 3a 9p (1a) |
| Act XV of 1887 (Burma Military Police) | In Urdu 9p (1a) |
| Ditto ditto | In Nagri 9p (1a) |
| Act XVIII of 1887 (Allahabad University) | In Urdu 1a (1a) |
| Act III of 1888 (Police) as modified up to 1st March 1893 | In Urdu 3p (1a) |
| Ditto (as passed) | In Nagri 6p (1a) |
| Act IV of 1888 (Indian Reserve Forces) as modified up to 1st March 1893 | In Urdu 3p (1a) |
| Ditto (as passed) | In Nagri 3p (1a) |
| Act VI of 1888 (Debtors) .. | In Urdu 6p (1a) |
| Ditto .. | In Nagri 6p (1a) |
| Act I of 1889 (Metal Tokens) as modified up to 1st April 1904 | In Urdu 6p (1a) |
| Ditto ditto | In Nagri 6p (1a) |
| Act II of 1889 (Measures of Length) .. | In Urdu 3p (1a) |
| Ditto | In Nagri 3p (1a) |
| Act IV of 1889 (Merchandise Marks) as modified up to 1st February 1904 ... | In Urdu 1a 9p (1a) |
| Ditto ditto | In Nagri 2a (1a) |
| Act VI of 1889 (Probate and Administration) | In Urdu 6p (1a) |
| Ditto ditto | In Nagri 6p (1a) |
| Act VII of 1889 (Succession Certificate) as modified up to 1st December 1903 .. | In Urdu 1a 9p (1a) |
| Act XIII of 1889 (Cantonment) as modified up to 1st March 1895 | In Nagri 3a (1a 9p) |
| Act XV of 1889 (Official Secrets) as modified up to 1st April 1904 | In Urdu 9p (1a) |
| Ditto ditto .. | In Nagri 9p (1a) |
| Act XVI of 1889 (Central Provinces Land Revenue) | In Urdu 1a 6p (1a) |
| Ditto ditto | In Nagri 1a 6p (1a) |
| Act XX of 1889 (Lunatic Asylums Amendment) | In Urdu 3p (1a) |
| Act I of 1890 (Revenue Recovery) | In Urdu 3p 1a) |
| Act II of 1890 (Amending Acts XVII of 1864 X of 1865 II of 1874 and V of 1881) | In Urdu 3p (1a) |
| Act V of 1890 (Indian Forest and Burma Forest Amendment) | In Urdu 6p (1a) |
| Act VIII of 1890 (Guardians and Wards) | In Urdu 2a 3p (1a 9p) |
| Act IX of 1890 (Railways) as modified up to 1st June 1905 | In Urdu 8a (2a) |
| Ditto ditto May 1890 | In Nagri 8a (2a) |
| Act X of 1890 (Press and Registration of Books Amendment) | In Urdu 3p (1a) |
| Act XI of 1890 (Prevention of Cruelty to Animals) | In Urdu 6p (1a) |
| Act XIX of 1890 (Salt Amendment) | In Urdu 3p (1a) |
| Act XX of 1890 (North Western Provinces and Oudh) | In Urdu 1a (1a) |
| Act X of 1891 (Indian Criminal Law Amendment) | In Urdu 3p 1a) |
| Act XIV of 1891 (Oudh Courts) .. | In Urdu 6p (1a) |
| Act XVIII of 1891 (Bankers Books Evidence) as modified by Acts I of 1893 and XII of 1900 | In Urdu 3p (1a) |
| Ditto ditto | .. In Nagri 6p (1a.) |

| | |
|---|---|
| Act II of 1892 (Christian Marriage Validation) ... ... | In Urdu 3 p (1 a) |
| Act IV of 1892 (Bengal Court of Wards Amendment) . | In Urdu 6 p (1 a) |
| Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) ... ... ... ... ... | In Urdu. 3 p (1 a) |
| Act IV of 1893 (Partition) ... . .. ... | In Urdu. 3 p (1 a) |
| Act I of 1894 (Land Acquisition) ... ... ... .. | In Urdu 2 a 3 p (1 a 6 |
| Ditto . ... ... | In Nagri 1 a 6 p (1 a 6 p) |
| Act III of 1894 (Criminal Procedure and Penal Codes Amendment) | In Urdu 3 p (1 a) |
| Act V of 1894 (Civil Procedure Code Amendment) ... ... | In Urdu 3 p. (1 a) |
| Ditto ditto ... ... | In Nagri 3 p. (1 a) |
| Act VIII of 1894 (Tariff), as modified up to 1st October 1903 ... | In Urdu 4 a (1 a) |
| Ditto ditto ... | In Nagri 3 a 9 p (2 a) |
| Act IX of 1894 (Prisons) ... ... ... | In Urdu 2 a 3 p (1 a) |
| Ditto ... ... ... .. .. | In Nagri. 2 a 3 p (1 a) |
| Act VII of 1895 (Civil Procedure Code and Punjab Law Act Amendment) ... ... ... ... ... | In Urdu 3 p (1 a) |
| Ditto ditto .. | In Nagri 3 p (1 a) |
| Act XII of 1895 (Companies—Memorandum of Association) ... | In Urdu 3 a. (1 a) |
| Act XIV of 1895 (Pilgrim Ships) ... ... ... ... | In Urdu. 1 a 3 p. (1 a) |
| Act II of 1896 (Cotton-duties) ... ... ... ... | In Urdu 1 a 3 p (1 a) |
| Ditto ... ... ... ... | In Nagri 1 a (1 a) |
| Act VI of 1896 (Indian Penal Code Amendment) ... ... | In Urdu 3 p (1 a) |
| Act VIII of 1896 (Inland Bonded Warehouses) . ... ... | In Urdu 3 p (1 a) |
| Ditto ditto ... ... ... | In Nagri 3 p (1 a) |
| Act XII of 1896 (Excise), as modified up to 1st August 1905 ... | In Nagri 3 a 3 p (1 a) |
| Act I of 1897 [Public (Servants Inquiries) Amendment] ... | In Urdu 3 p (1 a) |
| Ditto ditto ... ... ... | In Nagri 3 p (1 a) |
| Act II of 1897 (Criminal Tribes Amendment) ... .. | In Urdu 3 p (1 a) |
| Act III of 1897 (Epidemic Diseases) ... ... .. | In Urdu 3 p. (1 a) |
| Ditto .. ... ... .. | In Nagri. 3 p. (1 a) |
| Act IV of 1897 (Fisheries) ... ... . ... | In Urdu. 3 p. (1 a) |
| Ditto . ... ... ... | In Nagri 3 p. (1 a) |
| Act VI of 1897 (Negotiable Instruments Act Amendment)... .. | In Urdu 3 p (1 a) |
| Ditto . ditto ... ... | In Nagri 3 p (1 a) |
| Act VIII of 1897 (Reformatory Schools) .. ... .. | In Urdu. 1 a 3 p (1 a) |
| Ditto ... .. .. | In Nagri 6 p (1 a) |
| Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... | In Urdu. 9 p (1 a) |
| Ditto ditto ... | In Nagri 9 p. (1 a) |
| Act X of 1897 (General Clauses) ... ... . | In Urdu 1 a. (1 a) |
| Ditto . ... . ... ... | In Nagri 1 a (1 a) |
| Act XII of 1897 (Local Authorities Emergency Loans) ... ... | In Urdu 3 p (1 a) |
| Ditto ditto ... .. | In Nagri 3 p (1 a) |
| Act XV of 1897 (Cantonments) ... ... ... .. | In Urdu 3 p (1 a) |
| Act I of 1898 [Stage-carriages Act (1861) Amendment] ... ... | In Urdu 3 p (1 a) |
| Ditto ditto ... ... | In Nagri. 3 p (1 a) |
| Act III of 1898 (Lepers) ... .. ... ... | In Urdu 6 p (1 a) |
| Ditto .. .. ... ... ... | In Nagri 6 p (1 a) |
| Act IV of 1898 (Indian Penal Code Amendment) .. ... | In Urdu 3 p (1 a) |
| Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1900 .. ... ... ... ... | In Urdu Re. 1-4 (8 a) |
| Ditto ditto ... ... | In Nagri Re 1 6 (8 a) |
| Act VI of 1898 (Post Office) ... ... ... ... | In Urdu 3 a 3 p (1 a) |
| Ditto ... ... ... ... | In Nagri. 3 a. 3 p (1 a) |
| Act IX of 1898 (Live stock Importation) ... ... ... | In Urdu 3 p (1 a) |
| Ditto . ... ... ... | In Nagri 3 p. (1 a) |
| Act X of 1898 (Indian Insolvency Rules) ... ... ... | In Urdu. 3 p. (1 a) |

| | | |
|---|---|---|
| Act III of 1899 [Indian Marine Act (1887) Amendment] ... | ... In Urdu | 6 p. (1 a) |
| Ditto ditto ... | ... In Nagri. | 6 p (1 a.) |
| Act II of 1899 (Stamps), as modified up to 31st August, 1905 | In Urdu | 7 a 6 p (1 a 6 p) |
| Ditto ditto ... | ... In Nagri | 7 a 6 p (1 a 6 p) |
| Act IV of 1899 (Government Buildings) ... ... | ... In Urdu | 3 p (1 a) |
| Ditto ... ... .. | ... In Nagri | 3 p (1 a) |
| Act VII of 1899 [Indian Steam Vessels Act (1884) Amendment] | . In Urdu. | 3 p (1 a) |
| Ditto ditto ... | ... In Nagri | 3 p. (1 a) |
| Act VIII of 1899 (Petroleum), as modified up to 1st January, 1909 | ... In Urdu | 1 a. 6 p (1 a) |
| Ditto ditto .. ... | ... In Nagri | 1 a 6 p (1 a) |
| Act IX of 1899 (Arbitration) .. ... | .. In Urdu | 9 p (1 a) |
| Ditto ... ... ... ... | ... In Nagri. | 9 p (1 a) |
| Act XI of 1899 (Court-fees Amendment) ... ... | ... In Urdu | 6 p (1 a) |
| Ditto . . | .. In Nagri. | 6 p (1 a) |
| Act XII of 1899 (Currency Notes Forgery) .. ... | ... In Urdu | 3 p. 1 a) |
| Ditto ... ... | ... In Nagri. | 3 p (1 a) |
| Act XIV of 1899 (Tariff Amendment) ... ... | ... In Urdu. | 3 p. (1 a) |
| Ditto ... ... ... | ... In Nagri | 3 p. (1 a) |
| Act XVII of 1899 (Indian Registration Amendment) ... | ... In Urdu. | 3 p. (1 a) |
| Ditto ditto ... ... | ... In Nagri | 3 p (1 a) |
| Act XVIII of 1899 (Land Improvement Loans Amendment) | ... In Urdu | 3 p (1 a) |
| Ditto ditto ... .. | ... In Nagri | 3 p (1 a) |
| Act XX of 1899 (Presidency Banks) ... ... | ... In Urdu. | 3 p. (1 a) |
| Ditto ... ... ... | ... In Nagri | 3 p (1 a) |
| Act XXI of 1899 (Central Provinces Tenancy Amendment) ... | ... In Urdu. | 3 p. (1 a.) |
| Ditto ditto ... ... | ... In Nagri. | 3 p (1 a) |
| Act XXIV of 1899 (Central Provinces Court of Wards) ... | ... In Urdu | 1 a. 3 p. (1 a.) |
| Ditto ditto .. ... | ... In Nagri. | 1 a. 3 p. (1 a) |
| Act I of 1900 (Indian Articles of War Amendment) ... | ... In Urdu. | 3 p (1 a.) |
| Ditto ditto ... ... | .. In Nagri | 3 p. (1 a.) |
| Act III of 1900 (Prisoners), as modified up to 1st March, 1905 | .. In Urdu | 2 a 3 p. (1 a.) |
| Ditto ditto ... | .. In Nagri | 2 a 3 p (1 a) |
| Act IV of 1900 [Indian Companies (Branch Registers)] ... | ... In Urdu | 3 p. (1 a) |
| Ditto ditto ... ... | ... In Nagri. | 3 p. (1 a.) |
| Act IX of 1900 (Court Fees Amendment) ... ... | ... In Urdu | 3 p (1 a) |
| Ditto ... ... ... ... | ... In Nagri | 3 p (1 a) |
| Act X of 1900 (Census) ... ... ... ... | ... In Urdu | 9 p (1 a) |
| Ditto ... ... ... ... | ... In Nagri | 9 p (1 a) |
| Act II of 1901 [Indian Tolls (Army)] ... ... | ... In Urdu | 6 p (1 a) |
| Ditto .. ... ... | .. In Nagri. | 9 p (1 a) |
| Act V of 1901 [Indian Forest (Amendment)] ... ... | . In Urdu. | 3 p (1 a) |
| Ditto ... ... ... | .. In Nagri | 3 p (1 a) |
| Act VI of 1901 (Assam Labour and Emigration) ... | .. In Urdu | 5 a (2 a) |
| Ditto ... .. ... | ... In Nagri | 5 a (2 a) |
| Act VII of 1901 (Native Christian Administration of Estates) | ... In Urdu | 3 p (1 a) |
| Ditto ditto . ... | ... In Nagri | 3 p (1 a) |
| Act VIII of 1901 (Mines) ... ... ... . | . In Urdu. | 1 a (1 a) |
| Ditto . . | In Nagri | 1 a (1 a) |
| Act IX of 1901 [Indian Articles of War (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto ditto .. | ... In Nagri | 3 p (1 a) |
| Act X of 1901 [Court fees (Amendment) . | . In Urdu | 3 p (1 a) |
| Ditto . | . In Nagri | 3 p (1 a) |
| Act II of 1902 [Cantonments (House Accommodation)] | In Urdu. | 1 a (1 a) |
| Ditto ditto ... | In Nagri | 1 a (1 a) |
| Act IV of 1902 (Indian Tramways) ... .. | In Urdu | 3 p (1 a) |
| Ditto . .. | In Nagri | [illegible] |

| | |
|---|---|
| Act V of 1902 (Administrators-General and Official Trustees) | In Urdu. 3 p. (1 a.) |
| Ditto ditto | In Nagri. 3 p. (1 a.) |
| Act VII of 1902 [United Provinces (Designation)] | In Urdu. 3 p. (1 a.) |
| Act VIII of 1902 (Indian Tariff) | In Urdu. 3 p. (1 a.) |
| Ditto | In Nagri. 3 p. (1 a.) |
| Act II of 1903 [Indian Post Office (Amendment)] | In Urdu. 3 p. (1 a.) |
| Ditto ditto | In Nagri. 3 p. (1 a.) |
| Act III of 1903 (Electricity) | In Urdu. 2 a. 6 p. (1 a. |
| Ditto | In Nagri. 2 a. (1 a 6 p |
| Act VII of 1903 (Works of Defence) | In Urdu. 1 a. 3 p. (1 a.) |
| Ditto | In Nagri. 1 a 3 p. (1 |
| Act VIII of 1903 (Probate and Administration) | In Urdu. 3 p. (1 a.) |
| Ditto | In Nagri. 3 p. (1 a.) |
| Act IX of 1903 (Tea Cess) | In Urdu. 3 p. (1 a.) |
| Ditto | In Nagri. 3 p. (1 a) |
| Act X of 1903 (Victoria Memorial) | In Urdu. 3 p. (1 a.) |
| Ditto | In Nagri. 3 p. (1 a.) |
| Act XIII of 1903 (Lepers) | In Urdu. 3 p. (1 a) |
| Ditto | In Nagri. 3 p. (1 a.) |
| Act XIV of 1903 (Indian Foreign Marriages) | In Urdu. 3 p. (1 a.) |
| Ditto | In Nagri. 3 p. (1 a.) |
| Act XV of 1903 (Extradition), as modified up to 1st December, 1904 | In Urdu. 1 a. 9 p. (1 a |
| Ditto ditto | In Nagri. 1 a. 9 p. (1 |
| Act I of 1904 (Poisons) | In Urdu. 6 p. (1 a.) |
| Ditto | In Nagri. 6 p. (1 a.) |
| Act III of 1904 (Local Authorities Loan) | In Urdu. 3 p. (1 a.) |
| Ditto | In Nagri. 3 p. (1 a.) |
| Act IV of 1904 (North-West Border Military Police) | In Urdu. 9 p. (1 a.) |
| Act VI of 1904 [Transfer of Property (Amendment)] | In Urdu. 3 p. (1 a.) |
| Ditto ditto | In Nagri. 3 p. (1 a.) |
| Act VII of 1904 (Ancient Monuments Preservation) | In Urdu. 9 p. (1 a.) |
| Ditto ditto | In Nagri. 9 p (1 a.) |
| Act VIII of 1904 (Indian Universities) | In Urdu. 1 a. 3 p. (1 a |
| Ditto | In Nagri. 1 a. 3 p. (1 |
| Act X of 1904 (Co-operative Credit Societies) | In Urdu. 1 a. (1 a.) |
| Ditto | In Nagri. 1 a. (1 a.) |
| Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894) | In Urdu. 3 p. (1 a.) |
| Ditto ditto | In Nagri. 3 p. (1 a.) |
| Act XIII of 1904 (Indian Articles of War Amendment) | In Urdu. 3 p. (1 a.) |
| Ditto ditto | In Nagri. 3 p. (1 a.) |
| Act XV of 1904 [Indian Stamp (Amendment)] | In Urdu. 3 p. (1 a.) |
| Ditto | In Nagri. 3 p (1 a.) |
| Act I of 1905 [Local Authorities Loan (Amendment)] | In Urdu 3 p. (1 a.) |
| Ditto Ditto | In Nagri 3 p. (1 a) |
| Act II of 1905 [Indian Universities (Validation)] | In Urdu 3 p. (1 a.) |
| Ditto ditto | In Nagri. 3 p. (1 a) |
| Act III of 1905 (Indian Paper Currency) | In Urdu 9 p (1 a.) |
| Ditto | In Nagri. 9 p. (1 a.) |
| Act IV of 1905 (Indian Railway Board) | In Urdu. 3 p. (1 a.) |
| Act VI of 1905 (Court-fees Amendment) | In Urdu. 3 p. (1 a) |
| Ditto ditto | In Nagri. 3 p. (1 a.) |
| Act VII of 1905 (Bengal and Assam Laws) | In Urdu. 3 p. (1 a.) |
| Ditto ditto | In Nagri. 3 p. (1 a.) |
| Regulation I of 1890 (British Baluchistan Laws) | In Urdu 2 a. (1 a. 9 p.) |

| | |
|---|---|
| Regulation V of 1890 (British Baluchistan Forests) | In Urdu 2 a (1 a 6 p) |
| Regulation VI of 1893 (Hazara Forests) | In Urdu 2 a (1 a 6 p) |
| Regulation VIII of 1896 (British Baluchistan Criminal Justice) | In Urdu 9 p (1 a) |
| Regulation IX of 1896 (British Baluchistan Civil Justice) | In Urdu 2 a 3p (1 a) |
| Regulation III of 1901 (Frontier Crimes) | In Urdu 2 a 6 p (1 a) |
| Regulation IV of 1901 (Frontier Murderous Outrages) | In Urdu 6 p (1 a) |
| Regulation VII of 1901 (North West Frontier Province) | In Urdu 4 a 3 p (1 a) |

## V — MISCELLANEOUS PUBLICATIONS

| | | | |
|---|---|---|---|
| Table showing Effect of Legislation in the Governor General's Council during 1898 to 1900 | | | Rs 1 (1 a 6 p) |
| Ditto | ditto | during 1901 | 6 a (2 a) |
| Ditto | ditto | during 1902 | 2 a 6 p (1 a) |
| Ditto | ditto | during 1903 | 14 a (2 a) |
| Ditto | ditto | during 1904 | 4 a (3 a) |
| Ditto | ditto | during 1905 | 3 p (1 a) |

Annual Indexes to the Acts of the Governor General of India in Council from 1854 to 1905 The price is noted on each

Report of Indian Law Commission 1879 Foolscap Board .. R 1 (5 a)

Proceedings of the Council of the Governor General of India for making Laws and Regulations from July 1852 to 1905 Super royal 4to Annual subscription Rs 5 (Re 1) single issue 4 a, including postage.

Index to Indian Statutes: Chronological Tables and Index of the Indian Statutes, compiled under the orders of the Government of India by F G Wigley, of the Inner Temple Barrister at Law Edition 1897

A Digest of Indian Law Cases containing High Court's Reports 1862 to 1900 and Privy Council Reports of Appeals from India 1836 to 1900 with an Index of cases compiled under the orders of the Government of India by J V Woodman of the Middle Temple Barrister at Law, and Advocate of the High Court Calcutta In six volumes Super royal 8vo Rs 72 reduced to Rs 36 for cloth bound and Rs 78 reduced to Rs 39 for quarter bound (Rs 3 12)

Single volume reduced to Rs 7 when sold separately for the first and five volumes and to Rs 5 for the sixth

A Digest of the Statutes and Acts relating to Merchant Shipping in India, Edition 1854 By T A Pearson Barrister at Law — Rs 5 reduced to Rs 3 (12 a)

| | | |
|---|---|---|
| Index to Act V of 1869 (Indian Articles of War) as modified up to 1st January 1895 | | 7 a (2 a) |
| Ditto | ditto | In Urdu and Nagri 7 a (2 a) |
| Contents to ditto | .. | In Urdu and Nagri 1 a 3 p (1 a) |
| The Baluchistan Agency Forest Law, 1890 | | In Urdu 2 a (1 a 6 p) |
| The Quetta Municipal Law, 1896 | | In Urdu 3 a 3 p (1 a 6 p) |
| The Baluchistan Agency Criminal Justice Law 1896 | | In Urdu 9 p (1 a) |
| The Baluchistan Agency Civil Justice Law, 1896 | | In Urdu 2 a 6 p (1 a) |

## NOTICE TO SUBSCRIBERS.

In order that an opportunity may be afforded of investigating the cause of the non-delivery of any Part or Parts of the "Indian Law Reports, Allahabad Series," to subscribers, it has been found necessary to give notice that no complaint can be attended to regarding the loss of any Part or Parts unless information be forwarded to the Superintendent, Government Press, Allahabad, within three months after the date of publication: after that date back numbers can be supplied only on cash prepayment and not at the reduced rate of Re 0-5-0 per copy.

A TABLE

OF THE

# NAMES OF CASES REPORTED IN THIS VOLUME.

Page.

## PRIVY COUNCIL.



## FULL BENCH.



## APPELLATE CIVIL.

# A TABLE

OF THE

# NAMES OF CASES REPORTED IN THIS VOLUME.

# TABLE OF CASES CITED.

## A.



## B.

Page.



## C.



## D.



## E.



## F.



## G.

Page.

## M.



## N.



## P.

Page.



## Q



## R



## S.

Page



## U



## V



## W



## Z

# GENERAL INDEX OF CASES REPORTED IN THIS VOLUME

"*Person aggrieved*"—*Criminal Procedure Code, section* 198—*Procedure—Commitment*] In a case of bigamy the person aggrieved is either the first husband or the second husband and not the father Where a complaint was preferred by the father of the first husband, which resulted in a commitment on a charge under section 498 of the Indial Code it was *held* that the commitment was bad.



(11)—*Succession to estate of taluqdar dying intestate whose name is entered in lists 1 and 5—Impartible estate—' Primogeniture,'' meaning of in sanad granted by British Government in* 1860—*Effect of passing of Act No 1 of* 1869—*Lineal primogeniture and not nearness of degree*] A sanad granted to a taluqdar in 1860 contained the condition that "in the event of your dying intestate the estate shall descend to the nearest male heir according to the rule of primogeniture" After the passing of the Oudh Estates Act (I of 1869) his name was entered as a "taluqdar" in list 1 and in list 5 which was a list 'of the grantees to whom sanads or grants may have been or may be given or made by the British Government up to the date fixed for the closing of the list, declaring that the success on to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture"

*Held* that the meaning of the word 'primogeniture" in the sanad was the ordinary mean[illegible]

[illegible] in the affirmative—*Ran Bijai Bahadur Singh* v *Jagat pal Singh*, I. L. R 18 Calc, 111 L R 17 I A, 173 and *Jagdish Bahadur* v *Sheo Partab Singh* I L R 23 All, 369, L R 28 I A 100 The succession therefore to a taluq must be to an impartible estate whether the estate 'ordinarily devolved upon a single heir" as in *list 2 of* section 8 or whether the succession was to be regulated by the rule of primogeniture as in lists 3 and 5 *of section* 8

Section 22 in so far as it *describes* in the first ten of its subsections the specific order of heirs preferred to the success on, must have *force given to it* to the effect of standing as a statutory substitute for any line of success on set forth in the sanad Where sub section 11 *of section* 22 coming as it does at the close of the long list of specific stages of prescribed succession, sets up the rule that in default of any one taking under the previous sub sections there should be preferred "such persons as would have *been entitled* to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar, &c., are subject," it must be construed as being a general relegation of parties to the situation in which they would have been found apart from the Act.

Page.

Page.

Page.

Page.

Page.

Page

Page.

Page

Page.

Page

Page.

Page.

Page.

Registered No. A 422.

VOL. XXXII.] [PART I.



# THE INDIAN LAW REPORTS.

JANUARY 1910.

(Pages 1—51.)

## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council ... J. V. WOODMAN, *Middle Temple.*

High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*



ALLAHABAD:

PRINTED BY F. LUKER, SUPERINTENDENT, GOVERNMENT PRESS, AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT, UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

Price, Re. 1.

# THE INDIAN LAW REPORTS.

*Published in FOUR SERIES, viz —*

CALCUTTA, MADRAS, BOMBAY AND ALLAHABAD.

THE Indian LAW Reports, published under the authority of the Governor General in Council, are printed in monthly parts, which are issued, as soon as possible after the first of each month, at

... r the Madras High

... ourt

... orted in the Series

... n India not subject

... ne Madras, Bombay and Allahabad Series are distributed direct from Madras, Bombay and Allahabad, respectively.

Persons desiring to subscribe for or purchase the reports should apply to—
the Officer in charge, Bengal Secretariat Book Depôt, Calcutta, or
the Superintendent, Government Press, Madras, or
the Superintendent, Government Central Press, Bombay, or
THE CURATOR OF GOVERNMENT BOOKS, United Provinces, Allahabad

## PRICES.

The terms of subscription, and the terms on which current issues and back numbers are sold, are as follows —

| | Without postage | With Indian postage | With *Foreign* postage. |
|---|---|---|---|
| | Rs. a. p. | Rs. a. p | Rs. a. p |
| COMPLETE SERIES— | | | |
| Current issues, per annum ... | . | 22 8 0 | 28 0 0 |
| Back numbers, per annum .. | 20 0 0 | 22 8 0 | 28 0 0 |
| CALCUTTA SERIES— | | | |
| Current issues, or back numbers, per annum | 10 0 0 | 12 8 0 | 14 0 0 |
| MADRAS BOMBAY OR ALLAHABAD SERIES— | | | |
| Current issues or back numbers, per annum | 6 0 0 | 7 0 0 | 8 0 0 |
| ANY MONTHLY PART— | | | |
| Calcutta Series ... | 2 0 0 | 2 0 0 | 2 0 0 |
| Madras, Bombay or Allahabad Series | 1 0 0 | 1 0 0 | 1 0 0 |

***All payments must be made in advance*** Remittances to Calcutta should be addressed to the TREASURER, BENGAL SECRETARIAT, *Writers' Buildings, Calcutta*

## PARTS OUT OF STOCK AND DUPLICATE COPIES

WHEN a requisition is received for any set of the reports, and any Parts are out of stock, the following deduction from the foregoing rates is made for such Parts —

| | Without postage | With Indian postage |
|---|---|---|
| | Rs a p | Rs. a. p. |
| CALCUTTA SERIES | | |
| All Parts for one year .. | 7 2 6 | 8 0 3 |
| Any one Part .. | 0 8 9 | 0 10 3 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | |
| All Parts for one year .. | 4 4 6 | 4 11 3 |
| Any one Part .. | 0 5 3 | 0 5 9 |

If any Part is lost in transit to a subscriber, and the fact is reported to the office of distribution within three months from the date of publication, a duplicate will be supplied at the following rate:—

| | Without postage | With Indian postage |
|---|---|---|
| | Rs a p | Rs a p. |
| CALCUTTA SERIES .. | 0 8 9 | 0 10 3 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES . | 0 5 3 | 0 5 9 |

## REPRINTS

[illegible] 1876 1877 [illegible]
1899 [illegible]
Bo k [illegible]
Repor [illegible] ... replaced, Complete Reports from the beginning to date will therefore shortly be available at the Bengal Secretariat Book Depôt

## ADVERTISEMENTS FOR THE CALCUTTA SERIES

ADVERTISEMENTS of law publications only are received Rates can be ascertained on application to the Bengal Secretariat Book Depôt

# THE BENGAL LAW REPORTS.

SEVERAL volumes of the Bengal Law Reports from August 1868 to December 1875, and Full Bench Rulings, Parts I and II, are available at the Bengal Secretariat Book Depôt, Calcutta, at the following rates —

| | Without postage | With Indian postage |
|---|---|---|
| | Rs. a p. | Rs. a. p. |
| BENGAL LAW REPORTS, for one year ... | 20 0 0 | 22 8 0 |
| Single copies, each ... | 2 0 0 | 2 0 0 |
| FULL BENCH RULINGS, Parts I and II ... | 20 0 0 | 22 8 0 |

# POOKS AND PUBLICATIONS FOR SALE

BY THE

# SUPERINTENDENT OF GOVERNMENT PRINTING, INDIA

8, HASTINGS STREET, CALCUTTA

*A  k  ls pul  shel ly the Superintendent of Government Printing, India can be pur  ased either  lly  r  ugh the following or any other booksellers:—*

AGENTS

CALCUTTA—Thacker Spink & Co  
MADRAS—Higginbotham & Co

BOMBAY—{ Thacker & Co Ld  
{ Radhabai Atmaram Sagoon

NOTICE.—*Books required for private use only can be purchased. Application should be accompanied by a remittance and it is wished that the books should be sent by value payable post in which case besides the ordinary postage, an additional charge will be made for registration and commission.*

*Books required for the Public Service should be obtained through Local Governments*

*The amounts within parentheses are for packing and postage*

## List of Books and Publications for sale which are less than two years old

## LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India No 8 Hastings Street Calcutta ]

THE PRICES OF THE GENERAL ACTS LOCAL CODES MARCHANT SHIPPING DIGEST INDEX TO ENACTMENTS AND THE DIGESTS OF INDIAN LAW CASES 1[1]0 TO 1907 (SEPARATELY AND PER SET OF FIVE VOLUMES) HAVE BEEN CONSIDERABLY REDUCED

THE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPARTMENT

### I—THE INDIAN STATUTE BOOK

REVISED EDITION

*Super royal 8vo cloth lettered*

B—GENERAL ACTS

| | |
|---|---|
| General Acts of the Governor General of India in Council Vol I from 1834 to 1867 Edition 1909 | Rs 6 (10a) |
| General Acts of the Governor General in Council Vol II from 1868 to 1878 Edition 1909 | Rs 7 (10a) |
| General Acts of the Governor General in Council Vol III, from 1879 to 1886 Edition 1909 | Rs 6 (9a) |
| General Acts of the Governor General in Council Vol IV from 1887 to 1897 Edition 1909 | Rs 6 (9a) |
| General Acts of the Governor General in Council Vol V from 1898 to 1903 Edition 1909 | Rs 6 (9a) |
| Volume VI in the Press | |

C—LOCAL CODES

The Bengal Code Third Edition 1905 containing the Regulations and Local Acts in force in Bengal Vols I to V Rs 6 a volume or Rs 30 reduced to Rs 20 for set of 5 Vols

The Bombay Code Vol I, Third Edition, 1907 .. .. . Rs 4 (9 a)
Ditto Vol II, Third Edition 1907 . . . Rs 6 (5 a)
Ditto Vol III, Third Edition 1908 .. . Rs (5 a)
Ditto Vol IV Third Edition, 1909 . Rs 4 (5 a)
Volumes I to IV reduced to Rs 11 per set
The Coorg Code Third Edition 1908 . Rs 2 (1 a)
E B & Assam Code, Vol I, Edition 1907 Rs 6 (11 a)
Ditto Vol II, Edition 1907 . Rs 6 (9 a)
Ditto Vol III, Edition 1907 . Rs 6 (9 a)
Volumes I to III reduced to Rs 10 (per set)
The United Provinces Code, Volume I, Fourth Edition, 1906 consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table Rs 5 (8 a)
The United Provinces Code, Vol II, Fourth Edition, 1906, consisting of the Acts of the Lieutenant Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in or extended to the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874, with an Index Rs 10 (Re 1) for both Vols or Rs 5, (8 a) for each Volume
The United Provinces Code Vols I and II reduced to Rs 7 per set

*In the Press*

A Digest of Indian Tax Cases, 1908, by C F Grey, Barrister at Law
A new edition of the Burma Code

## II—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION

Act I of 1846 (Legal Practitioners) as modified up to 1st October, 1907. 2 a (1 )
Act XXXVII of 1850 (Public Servants (Inquiries), as modified up to 1st August, 1905 11 a (1 a)
Act XXX of 1852 (Naturalization of Aliens) as modified up to 30th April, 1908 2 a (1 a)
Act XX of 1853 (Legal Practitioners), as modified up to 1st September, 1907 1 a 9 p (1 a)
Act XXIII of 1855 (Administration of mortgaged Estates) as modified up to 1st October 1908 1 a 3 p (1 a)
Act XXIV of 1855 (Penal Servitude) as modified up to 1st January, 1909, 2 a (1 a)
Act XIII of 1857 (Opium) as modified up to 1st August, 1908 4 a 3 p (1 a)
Act IX of 1859 (Forfeiture), as modified up to 1st October 1908 1 a 9 p (1 a)
Act XXIV of 1859 (Madras District Police) as modified up to 1st November 1907 3 a 6 p (2 a)
Act XVI of 1863 (Excise Duty on Spirits) as modified up to 1st October 1903 2 a (1 a)
Act XXXI of 1863 (Gazette of India) with footnotes 1 a 3 p (1 a)
Act X of 1865 (Succession), as modified up to 1st April 1909 Rs 1 8 (2 a)
Act XXII of 1867 (Serais and Puraos), as modified up to 1st August, 1905 2 a (1 a)
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907 5 a (1 a)
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1909 Rs 1 2 (3 a)
Act V of 1870 (Unclaimed Deposits) as modified up to 1st October, 1903 1 a (1 a)
Act VII of 1870 (Court Fees) as modified up to 1st February 1909 Re 1 (1 a)
Act XXVII of 1871 (Criminal Tribes) as modified up to 1st October, 1908 ... 5 a 6 p (1 a 6 p)

| | |
|---|---|
| Act I of 1872 (Evidence) as modified up to 1st May 1908 | 1 1 (a) |
| Act IX of 1872 (Contract) as modified up to 1st February 1908 | R 1 4a (2a) |
| Act I of 1878 (Opium) as modified up to 1st October 1907 | 6a p (1a) |
| Act XI of 1878 (Treasure Trove) as modified by Act XII of 1891 as modified up to 1st February 1908 | 2 9p (1a |
| Act VIII of 1878 (Sea Customs) as modified up to 1st June 1908 | 1s 1a 3 ( ) |
| Act XI of 1878 (Arms) as modified up to 1st October 1908 | 6a (1a) |
| Act XVI of 1878 (Transport of Salt) as modified up to 1st October 1908 | 1a 6p (1a) |
| Act XVIII of 1881 (Central Provinces Land Revenue) as modified up to 1st March 1908 | 1s 12 (3a) |
| Act IV of 1884 (Explosives) as modified up to 1st September 1908 | 4a 9p (1a) |
| Act III of 1886 (Births, Deaths) as modified up to 1st January 1908 | 1s 9p (1a) |
| Act II of 1889 (Measures of Length) with footnotes | 1a 3p (1a) |
| Act IV of 1889 (Merchandise Marks) as modified up to 1st August 1908 | 6a (1a) |
| Act VI of 1889 (Land Alienation) as modified up to 1st January 1909 | 2a 9p (1a) |
| Act VI of 1890 (Charitable Endowments) as modified up to 1st August 1908 | 2 6p (1a) |
| Act XI of 1890 (Prevention of Cruelty to Animals) with footnotes | a (1a) |
| Act XIII of 1890 (Excise Malt Liquors) as modified up to 1st October 1908 | 1 6p (1a) |
| Act VIII of 1899 (Petroleum) as modified up to 1st January 1909 | (1a) |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 | 2 6p (1a) |
| Act X of 1904 (Co-operative Credit Societies) with the forms of rules and orders made under the Act | 6p 1a) |

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED

Acts (Imperial) of the Governor General of India in Council from 1800 up to date

[Regulations made under the Statute 33 Vict Cap 3 from 1900 up to date]

The above may be had separately. The price [illegible]

## IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL

| | |
|---|---|
| Act XIII of 1857 (Opium) as modified up to 1st August 1908 | In Urdu 9p (1a) |
| Ditto ditto | In Nagri 9p (1a) |
| Act XXII of 1867 (Sarais and Puraos) as modified up to 1st August 1908 | In Urdu 6p (1a) |
| Ditto ditto | In Nagri 6p (1a) |
| Act XXV of 1867 (Press and Registration of Books) as modified up to 1st October 1908 | In Urdu 1a 3p (1 |
| Ditto ditto | In Nagri 1a 3p (1 |
| Act V of 1870 (Unclaimed Deposits) as modified up to 1st October 1908 | In Nagri 3p (1a) |
| Act I of 1872 (Evidence) as modified up to 1st May 1908 | In Urdu 8a ( a) |
| Ditto ditto | In Nagri 8a (2a) |
| Act I of 1878 (Opium) as modified up to 1st October 1907 | In Urdu 1a 6p (1 |
| Ditto ditto | In Nagri 1a 6p (1 |
| Act XIII of 1859 (Cantonments) as modified up to 1st October 190 | In Urdu [illegible] (1a 6p) |
| Act XII of 1896 (Excise) as modified up to 1st March 1907 | In Urdu 2a 9p ( |
| Ditto ditto | In Nagri 3a 3p ( |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 | In Urdu 9p (1 |

Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February, 1908 ... In Nagri 9 p. (1 a.)
Act I of 1906 [Indian Tariff (Amendment)] ... In Urdu 3 p (1 a)
Ditto ditto . In Nagri, 3 p (1 a)
Act III of 1906 (Coinage) ... In Urdu 9 p (1 a)
Ditto ditto ... In Nagri. 9 p (1 a)
Act V of 1906 (Stamp Amendment) ... In Urdu. 3 p (1 a)
Ditto ditto ... In Nagri. 3 p. (1 a)
Act III of 1907 (Provincial Insolvency) ... In Urdu. 1 a 6 p (1
Ditto ditto ... In Nagri. 1 a. 6 p (1
Act IV of 1907 [Repealing and Amending (Rates and Cesses)] ... In Urdu 3 p. (1 a)
Ditto ditto ... In Nagri 3 p. (1 a)
Act V of 1907 (Local Authorities Loan) ... In Urdu. 3 p (1 a)
Ditto ditto ... In Nagri 3 p (1 a)
Act VI of 1907 (Prevention of Seditious Meetings) ... In Urdu. 3 p (1 a)
Ditto ditto ... In Nagri. 3 p. (1 a)
Act I of 1908 (Legal Practitioners) ... In Urdu 3 p. (1 a)
Ditto ditto ... In Nagri. 3 p (1 a)
Act II of 1908 (Tariff) ... In Urdu. 3 p (1 a)
Ditto ditto ... In Nagri 3 p (1 a)
Act V of 1908 (Code of Civil Procedure) ... In Urdu Re. 1 2 a (6
Ditto ditto ... In Nagri Re 1 2 a
Act VI of 1908 (Explosive Substances) ... In Urdu 3 p (1 a)
Ditto ditto ... In Nagri. 3 p (1 a.)
Act VII of 1908 (Incitements to offences) ... In Urdu 3 p (1 a)
Ditto ditto ... In Nagri 3 p (1 a)
Act IX of 1908 (Limitation) ... In Urdu 2 a (1 a)
Ditto ditto ... In Nagri 2 a (1 a)
Act X of 1908 (Salt Duties) ... In Urdu 3 p. (1 a)
Ditto ditto ... In Nagri 3 p (1 a)
Act XI of 1908 (Assam Labour and Emigration) ... In Urdu 3 p (1 a)
Ditto ditto ... In Nagri 3 p (2 a)

## V.—MISCELLANEOUS PUBLICATIONS

Table showing Effect of Legislation in the Governor General's Council during 1906 ... 3 a 6 p (1 a)
Ditto ditto during 1907 2 a 6 p (1 a)
Ditto ditto during 1908 4 a (1 a)

Annual Indexes to the Acts of the Governor General of India in Council for 1906 and 1907 The price is noted on them

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date Super-royal 4 to Annual subscription Rs 5 (Re 1), single issue 4a, including postage

Addenda and Corrigenda List No I of 1906 to the List of General Rules and Orders ... 3 p (1 a)
Ditto ditto No II of 1906 1 a 9 p (1 a)
Ditto ditto No. I of 1907. 3 p (1 a)
Ditto ditto No II of 1907 . 1 a (1 a)
Ditto ditto No I of 1908 .. 1 a 6 p (1 a)
Ditto ditto No II of 1908 . 2 a 9 p (1 a)

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India, 1901-03, with an Index of cases, compiled under the orders of the Government of India, by H. G. Wigley, of the Inner Temple, Bar-at-Law, Edition 1905 Rs 10 Reduced to Rs 5 per copy ... (10 a)

## NOTICE TO SUBSCRIBERS.

In order that an opportunity may be afforded of investigating the cause of the non-delivery of any Part or Parts of the "Indian Law Reports, Allahabad Series," to subscribers, it has been found necessary to give notice that no complaint can be attended to regarding the loss of any Part or Parts unless information be forwarded to the Superintendent, Government Press, Allahabad, within three months after the date of publication: after that date back numbers can be supplied only on full prepayment and not at the reduced rate of Re 0-5-9 per copy.

---

A DIGEST OF INDIAN LAW CASES containing High Court Reports, 1862—1886, and Privy Council Reports of Appeals from India, 1836—1886, with an Index of Cases. Compiled, under the orders of the Government of India, by JOSEPH VERE WOODMAN, of the Middle Temple, Barrister-at-Law, and Advocate of the High Court, Calcutta In five volumes. Price, exclusive of packing and postage, Rs 10 per volume; quarter-bound copies, Rs. 11

Copies can be obtained at the Office of the Superintendent of Government Printing, India, Calcutta.

# TABLE OF CASES REPORTED

# TABLE OF CASES CITED

# INDEX.

PAGE.

PAGE

# THE
# INDIAN LAW REPORTS
## Allahabad Series.

## APPELLATE CIVIL.

1907
*April 6*

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Burkitt.*

BALDEO PRASAD (DEFENDANT) *v* UMAN SHANKAR (PLAINTIFF) AND OTHERS (DEFENDANTS).*

*Act No. IV of* 1882 (*Transfer of Property Act*), *section* 101—*Prior and subsequent mortgagees—Purchase of mortgaged property by prior mortgagee—Suit for sale by subsequent mortgagee.*

*Held* that a prior mortgagee who had in the exercise of a right of pre-emption purchased the property mortgaged to him had a right to be repaid the money due in respect of his mortgage before a subsequent mortgagee could bring such property to sale in execution of a decree on the mortgage held by the latter.

IN this case one Baldeo Prasad, the holder of a usufructuary mortgage of the year 1891, in the exercise of a right of pre emption purchased the mortgaged property, which had been sold by the mortgagor in 1902. In 1905 one Uman Shankar the holder of a subsequent simple mortgage of the 11th August 1902 brought a suit for sale on his mortgage. Baldeo Prasad set up the defence that Uman Shankar was bound to pay to him the amount secured by his prior mortgage of 1891 before he could obtain a decree for sale. This defence was accepted by the court of first instance (Subordinate Judge of Farrukhabad), which gave the plaintiff a decree subject to his repaying to Baldeo Prasad the amount of the mortgage of 1891. On appeal, however, the District Judge modified the decree by removing this condition Baldeo Prasad appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Munshi *Gulzari Lal*, for the appellant

* Second Appeal No 1069 of 1905 from a decree of H W. Lyle District Judge of Farrukhabad, dated the 8th August, 1905, modifying a decree of Raj Nath Prasad, Subordinate Judge of Farrukhabad, dated the 13th May, 1905.

1907

BALDEO PRASAD v. UMAN SHANKAR

Babu *Durga Charan Banerji* and Dr *Satish Chandra Banerji*, for the respondents

STANLEY, C J, and BURKITT, J —This appeal arises out of a suit for sale on a mortgage of the 11th of August 1902, executed by the defendant Debi Din to secure a sum of Rs 1,400 There was a previous usufructuary mortgage of the year 1891 in existence at the date of this mortgage, by which a principal sum of Rs 1,000 was secured in favour of the defendant Baldeo Prasad On the 20th of October, 1902, the mortgagor Debi Din sold his equity of redemption to one Girdhari Lal for a sum of Rs 1,800, of which amount Rs 800 was paid in cash, and Rs 1,000 was left in the hands of Girdhari Lal to satisfy the mortgage debt of Baldeo Prasad Baldeo Prasad was a co sharer in the village, and as such was entitled to pre-empt this sale, and he sued for pre emption and obtained a pre emption decree Upon pre emption he paid Rs 800 to the vendor and retained Rs 1,000, portion of the purchase money, in satisfaction of his own prior mortgage of 1891 The plaintiff in the present litigation is the holder of the second mortgage, and as such instituted the suit out of which this appeal has arisen on the 3rd of January 1905 to recover his debt by sale of the mortgaged property The defendant Baldeo Prasad set up the case that he is entitled to hold up the mortgage of 1891 as a shield against the plaintiff's claim and that the plaintiff cannot have a sale without paying the amount of the earlier mortgage debt The court of first instance in a carefully written judgment decided in favour of the defendant Baldeo Prasad and held that he was entitled to rely on the prior incumbrance On appeal, however, the learned District Judge has taken a different view of the rights of the parties and held that the puisne incumbrancer is entitled to a sale of the property discharged from the prior mortgage We are at a loss to understand the reasoning by which he arrived at this conclusion Section 101 of the Transfer of Property Act, which only embodies the law as it existed previously upon this subject, protects a purchaser, as the purchaser here, against the claims of puisne incumbrancers, where, holding a prior mortgage, he has purchased the mortgaged property. It provides that where the owner of a charge, or other incumbrance on immovable property, becomes absolutely entitled

to that property, the charge or incumbrance shall be extinguished unless he declares by express words or necessary implication that it shall continue to subsist, or, as is the case before us, such continuance would be for his benefit It was clearly for the benefit of Baldeo Prasad when he became the absolute owner of the property that his prior charge should be kept alive, and how the lower appellate court came to hold that the property which he purchased could be sold at the instance of a puisne incumbrancer without any regard to the earlier incumbrance we are at a loss to understand We think that the decision arrived at by the learned Subordinate Judge upon this question is entirely correct We therefore allow the appeal, set aside the decree of the District Judge, and restore the decree of the court of first instance with costs in all courts

1907

BALDEO PRASAD v. UMAN SHANKAR.

*Appeal allowed.*

---

1909 *July* 29

*Before Mr Justice Banerji and Mr Justice Tudball.*

ARDESHIRJI FRAMJI AND ANOTHER (JUDGMENT DEBTORS) v KALYAN DAS (DECREE HOLDER) *

*Civil Procedure Code,* (1908) *sections* 47, 96 104 (*b*), 135 (2)—*Execution of decree—Arrest—Privilege of exemption from arrest under civil process—Appeal.*

Certain judgment-debtors, who had come from Bombay to Benares to look after an application which they had made for the rehearing of a case decided against them *ex parte*, were arrested under a warrant taken out by the decree-holder in execution of his decree At the time of their arrest the judgment-debtors were seated in the train at the Benares railway station and had taken tickets for Allahabad *Held* that the judgment-debtors were not exempted from arrest under section 135 of the Code of Civil Procedure 1908, also that the order for their arrest was appealable as a decree under section 96 of the Code *In the matter of Siva Bux Savuntharam* (1) not approved. *Wooma Churn Dhole* v. *Teil* (2) referred to

IN this case an *ex parte* decree was passed against the appellants, who were residents of Bombay, by the Subordinate Judge of Benares on the 8th of January, 1909. They applied to have it set aside, and the application was heard on the 22nd of March 1909 They came up to Benares from Bombay for the purpose of this application, and having arrived on the evening of the 21st

* Execution First Appeal No 96 of 1909 from a decree of Maula Bakhsh, Subordinate Judge of Benares dated the 29th of March 1909.

(1) (1881) I. L R 4 Mad. 317. (2) (1875) 14 B. L R, App, 13.

1910

EMPEROR v. MUHAMMAD YAKUB.

or susceptibilities of individuals can be allowed to override such rights." We entirely agree with those remarks, and we think they apply with great force to the present case. To justify an order under section 107 of the Criminal Procedure Code, the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquillity or to do some "wrongful" act that may probably occasion a breach of the peace. In our judgement there was no reason to believe that any of the applicants were about to do any of these things. If the order was intended (as we think it was) absolutely to prevent the applicants and their co-religionists from killing cows the order was not justified and is illegal. The Magistrate says.—"To prevent them doing overt acts likely to cause a breach of the peace, &c, it seems to me necessary to bind the leading and more influential men among them under section 107."

We allow the application and set aside the order. Bail bonds, &c, will be discharged.

*Application allowed.*

## APPELLATE CIVIL.

1910
*May 5.*

*Before Mr. Justice Richards and Mr Justice Tudball.*

BHAGIRATHI (DEFENDANT) v. JOKHU RAM UPADHIA AND OTHERS (PLAINTIFFS) AND RAM NANDAN AND OTHERS (DEFENDANTS).*

*Hindu Law—Joint Hindu family—Alienation by father—Lawful family necessity—Second marriage of member of the family—Marriage in the Asura form*

The first marriage of a member of a Hindu joint family is a lawful family necessity for which an alienation of family property will be justified. *Sundrabai v. Shivanarayana,* (1) followed. Every second marriage, however, is not a legal necessity. But where a Hindu's wife died while he was 28 years of age, leaving a son about 9 years old at that time, and he married a second time and for that purpose alienated family property. *Held* that the alienation under the circumstances was for lawful necessity and was binding on the son.

*Per* RICHARDS, J.—Bearing in mind that this (*asura*) form of marriage is quite common and that the purchase of a bride in this sense is quite common, it

(1) (1907) I. L. R. 32 Bom. 81

were allowed the result would be to reduce the law to an absurdity. The object and policy of the section is in the interests of justice and extends only so far as the justice of the case requires; the section confers no personal privilege The privilege would avail if the judgment debtor were going direct from the court to his home. The section, moreover, contemplates that the matter should be pending, in this case the matter had been disposed of.

No hard and fast rule as to the extent or duration of the privilege can be laid down With reference to the facts of the present case no case for the exercise of the privilege has been made out.

BANERJI and TUDBALL, JJ.—This appeal arises out of proceedings relating to the execution of a decree The facts are briefly as follows The respondent obtained an *ex parte* decree against the appellants on the 8th of January, 1909 The appellants applied to the Court to set aside the *ex parte* decree and to rehear the case This matter came up for decision on the 27th of March 1909 The appellants, it appears are residents of Bombay The suit was in the court of the Subordinate Judge of Benares. Apparently for the purpose of looking after their case the appellants proceeded to Benares and there put up at a dák bungalow. They attended the court on the 27th of March, the case was heard and their application was dismissed They left the court, *returned to the dák bungalow, and thence proceeded to the* railway station In the meantime the decree holder had applied for execution of the decree and for the arrest of his judgment-debtors, warrants were issued, and the appellants were arrested when actually seated in the train They had, it appears, taken tickets for Allahabad, at least that is the finding of the court below on the evidence before it The appellants claimed the privilege granted by section 135 of Act No V of 1908 They pleaded that they were exempt from arrest on the ground that they were returning from the court to their home This plea was disallowed by the lower court Hence the present appeal.

A preliminary objection was taken by the learned advocate for the respondent that no appeal lies He relies upon section 104, clause (*h*), of the Code of Civil Procedure, 1908, and urges

1910

BHAGIRATHI v. JOKHU RAM UPADHIA.

cannot be held that the money which was raised was not part of the expenses of a legal marriage.

THE facts of this case were as follows:—

One Bhagwati Singh was a member of a joint Hindu family. The appellant was his son by his first wife. That wife having died, Bhagwati Singh married again. For this marriage, which was in the *asura* form, he had to pay Rs. 170 to the bride's father. A loan for this amount was obtained from the plaintiff and joint family property was mortgaged by Bhagwati Singh and his uncle, Bindeshri Singh, to secure this loan. Bhagwati Singh was about 28 years of age at the time of his second marriage. The plaintiff sued on foot of his mortgage, the appellant objected that the debt was not binding upon him as it was not contracted for a legal necessity and he had not been benefited by it, and that the purpose of the debt was one which was opposed to public policy. Both the lower courts overruled these objections and decreed the suit. Hence this appeal.

Munshi *Haribans Sahai*, for the appellant:—

The purchase of a wife by a Hindu widower having issue by the former wife is not an object which under the Hindu Law would validate a mortgage of the family property. By "purchase" I mean a marriage in the *asura* form, in which the father of the bride is paid a sum of money as the consideration for his giving his daughter in marriage, and not merely as a voluntary present to the bride's relations made at the time of the marriage. In the present case the money was paid to the father as a condition precedent to the marriage. An agreement to pay such a sum of money has been held to be immoral and opposed to public policy. *Kalavagunta Venkata Kristnayya* v. *Kalavagunta Lakshmi Narayana* (1), *Dholidas Ishvar* v. *Fulchand Chhagan* (2), and *Baldeo Sahai* v. *Jumna Kunwar* (3). Such payment being immoral and opposed to public policy is not a legal necessity and would not be binding upon the son. The "marriage expenses" of a member of a joint Hindu family may be a legal necessity, but they would not include the price paid for the girl. J. C. Ghose: *Principles of Hindu Law*, 2nd edn., p. 672.

(1) (1909) I. L. R., 32 Mad., 185. (2) (1897) I. L. R. 22 Bom., 658. (3) (1901) I. L. R., 23 All., 495.

1909

ARDESHIRJI FRAMJI v. KALYAN DAS.

decision of PHEAR, J., in the case of *Wooma Churn Dhole* v. *Teil* (1) In that case a person having been summoned to Calcutta as a witness in a certain case, reached Calcutta before the case came on, and while there, he was arrested in execution of a decree. At the time of his arrest he was, as a matter of fact, actually returning from the court by a roundabout way to his place of residence in Calcutta, having gone to the court somewhat unnecessarily to find out about the case. It was held that he did not come within the privilege. In the present case the appellants had left the court and had returned to the place where they were staying in Benares; they had then left that place and were actually on their way to Allahabad, which is not their home. In these circumstances we cannot hold that they, at the time of arrest, were returning from a tribunal within the meaning of section 135. In this view the appeal fails and we dismiss it with costs.

In view of the fact that the order of the lower court rejecting the appellants' application to have the *ex parte* decree set aside has been reversed by this Court on appeal and the case has been remanded for decision on the merits after taking evidence, we think the lower court would exercise a wise discretion if it stayed execution of the decree, pending the disposal of that application.

*Appeal dismissed.*

(1) (1875) 14 B L R, App, 13.

The case of *Sundrabai Javji* v. *Shivnarayana*, (1) lays down that the marriage expenses of a son constitute a legal necessity; but there is no authority for the proposition that a second marriage of a father constitutes a legal necessity.

In another case it was even held that an alienation by a Hindu father to defray the expenses of the marriage of his son would not be binding upon his sons, *Govindarazulu Narasimham* v *Devarabhotla Venkatanarasayya*, (2) There are observations in my favour in the case of *Durbar Khachar Shri Odha Ala* v *Khachar Harsur Oghad* (3).

Munshi *Gokul Prasad*, for the respondents:—

The marriage of a Hindu is a *sanskara*, the existence of a wife is necessary for the performance of certain religious ceremonies, for example *agnihotri*, which cannot be performed unless there is a wife Siromani, *Hindu Law*, p 156, 158 A second marriage of a Hindu is therefore necessary and enjoined by the *shastras* For secular purposes, too, the marriage was desirable and proper The age of the widower was only 28 and he had a child to be looked after As to the *asura* form of marriage, all that *Manu* lays down is that one should not take anything as the price of his daughter The marriage, though condemned, is quite valid The father of the bride is prohibited from taking money for the marriage, but the bridegroom is not prohibited from making a payment In the *arsha* form of marriage, which is an approved form, the payment is made in kind instead of in cash; that is the only difference which is not one of principle but of detail The loan was expressed to be taken for "marriage expenses" (*bazarurat anjam kar shadi*) That would be a legal necessity; and the creditor was not bound to see to the application of the money In the case of *Jairam Nathu* v. *Nathu Shamji* (4) it was held that the expenses of the marriage of younger brothers were a legal or family necessity The uncle, Bindeshri Singh, as head of the joint family, was bound to perform the marriage of his nephew Bhagwati Singh There is no essential difference between a first and a second marriage The religious ceremonies are the same in both cases

(1) (1907) I. L. R. 32 Bom., 81
(2) (1903) I. L. R., 27 Mad., 206
(3) (1903) I. L. R., 32 Bom., 348.
(4) (1906) I. L. R., 31 Bom., 54.

1909

SHAHZADE SINGH v. MUHAMMAD MEHDI ALI KHAN.

When the question of title was raised in the Revenue Court, that court could, under the provisions of section 199, either refer the then defendants to the Civil Court for determination of the question of title raised, or determine such question of title itself It is immaterial whether the court before which the question was raised was a court of an Assistant Collector of the first class or of the second class The Revenue Court having decided the question adversely to the present plaintiffs, that decision must be treated as the decision of a Civil Court, and so far as the same question of title raised in the present suit is concerned, that decision operates as *res judicata* This was the view taken by this Court in *Salig Dube* v *Deoki Dube* (1) and *Beni Pande* v. *Raja Kausal Kishore Prasad* (2) The learned counsel for the respondents has ingeniously argued that the court which decided the previous suit was not a court competent to try the present suit and therefore its decision cannot have the effect of *res judicata* He contends that the Assistant Collector of the second class who tried the previous suit had jurisdiction over suits of the value of Rs 100 only, whereas the present suit has been valued at Rs 250, and therefore the Assistant Collector could not be held to be a court competent to try the subsequent, namely the present, suit Having regard to the provisions of section 199, if the then defendants had been referred to a Civil Court, the case would have been instituted in the Civil Court of the lowest grade, having jurisdiction over the suit The Revenue Court, which, according to the provisions of that section was competent to try the suit and the question of title raised in it, must be deemed for the purposes of that section, to be the Civil Court which would have been competent to try the suit if the parties had been referred to a Civil Court This was held in the analogous case of a question of title determined by a Revenue Court under the provisions of the Land Revenue Act in *Har Charan Singh* v *Har Shankar Singh* (3) The Court of the Assistant Collector of the second class being thus, for the purposes of the suit which was before it, a Civil Court of the lowest grade competent to try the suit, its decision must be

(1) Weekly Notes 1907 p 1 (2) (1906) I. L R, 29 All, 160
(3) (1895) I L. R, 18 All., 59.

1910

BHAGIRATHI v. JOKHU RAM UPADHIA

cannot be held that the money which was raised was not part of the expenses of a legal marriage

THE facts of this case were as follows —

One Bhagwati Singh was a member of a joint Hindu family The appellant was his son by his first wife That wife having died, Bhagwati Singh married again For this marriage, which was in the *asura* form, he had to pay Rs 170 to the bride's father. A loan for this amount was obtained from the plaintiff and joint family property was mortgaged by Bhagwati Singh and his uncle, Bindeshri Singh, to secure this loan Bhagwati Singh was about 28 years of age at the time of his second marriage The plaintiff sued on foot of his mortgage, the appellant objected that the debt was not binding upon him as it was not contracted for a legal necessity and he had not been benefited by it, and that the purpose of the debt was one which was opposed to public policy Both the lower courts overruled these objections and decreed the suit Hence this appeal

Munshi *Haribans Sahai*, for the appellant —

The purchase of a wife by a Hindu widower having issue by the former wife is not an object which under the Hindu Law would validate a mortgage of the family property By "purchase" I mean a marriage in the *asura* form, in which the father of the bride is paid a sum of money as the consideration for his giving his daughter in marriage, and not merely as a voluntary present to the bride's relations made at the time of the marriage, in the present case the money was paid to the father as a condition precedent to the marriage An agreement to pay such a sum of money has been held to be immoral and opposed to public policy *Kalavagunta Venkata Kristnayya* v *Kalavagunta Lakshmi Narayana* (1), *Dholidas Ishvar* v *Fulchand Chhagan* (2), and *Baldeo Sahai* v *Jumna Kunwar* (3) Such payment being immoral and opposed to public policy is not a legal necessity and would not be binding upon the son The "marriage expenses" of a member of a joint Hindu family may be a legal necessity, but they would not include the price paid for the girl J. C Ghose · *Principles of Hindu Law*, 2nd edn., p 672

(1) (1908) I. L. R., 32 Mad., 185 (2) (1897) I. L. R. 22 Bom., 658
(3) (1901) I. L. R., 23 All., 495

Munshi *Govind Prasad*, for the respondent, was not called upon. 1909

SHAHZADE SINGH *v.* MUHAMMAD MEHDI ALI KHAN.

KNOX, A. C. J. and RICHARDS, J :—We agree with the view taken by our learned brother in this case. The matter now raised has been decided more than once by this Court in the same way and we are not disposed to take any other view, which might well open a door to fraud. The appeal is dismissed with costs.

*Appeal dismissed.*

---

*Before Mr. Justice Banerji and Mr. Justice Alston.*

1909 *August 6.*

CHITTAR MAL AND ANOTHER (PLAINTIFFS) *v.* BIHARI LAL AND OTHERS (DEFENDANTS) *

*Act No. XV of* 1877 (*Indian Limitation Act*), *schedule II, article* 85—"*Current mutual account*"—*Limitation.*

*Held* that a "mutual" account within the meaning of article 85 of the second schedule to the Indian Limitation Act, 1877, is an account of dealings between two parties which are such as to create independent obligations in favour of one party against the other. *Ganesh* v *Gyanu* (1) and *Ram Pershad* v. *Harbans Singh* (2) followed. *Bhawan Singh* v *Tika Ram* (3) referred to.

THIS was a suit for the recovery of a sum of Rs. 1,235-15-6 as the balance of an account subsisting between the parties. The plaintiffs alleged that an account of dealings between them and the defendants was opened on Maghsar Sudi 9th, Sambat 1956, corresponding to the 11th December 1899, and that on the 13th of August 1904, the account was stated between the parties and a balance of Rs. 2,394 9 3 was struck in favour of the plaintiffs; that subsequently the plaintiffs realised Rs 1,479-10 6 on account of the price of wheat sold by them for the defendants, and the defendants were debited with Rs 312-14-0 on account of interest and other charges, the amount claimed being the balance. The defendants asserted that they had no dealings with the plaintiffs and denied that any account was stated or that any sum was due by them The court of first instance found in favour of the defendants and dismissed the suit. Upon appeal

---

* [illegible] from a decree of Khetra Mohan Ghose, [illegible]ated the 30th of March 1908, confirming [illegible] Munsif of Hathras, dated the 12th of [illegible]

(1) (1897) I. L R, 22 Bom, 606. (2) (1907) 6 C. L. J, 158.
(3) Weekly Notes, 1896, p. 186.

The case of *Sundrabai Javji* v. *Shivnarayana*, (1) lays down that the marriage expenses of a son constitute a legal necessity; but there is no authority for the proposition that a second marriage of a father constitute a legal necessity

In another case it was even held that an alienation by a Hindu father to defray the expenses of the marriage of his son would not be binding upon his sons, *Govindarazulu Narasimham* v *Devarabhotla Venkatanarasayya*, (2) There are observations in my favour in the case of *Durbar Khachar Shri Odha Ala* v *Khachar Harsur Oghad* (3)

Munshi *Gokul Prasad*, for the respondents —

The marriage of a Hindu is a *sanskara*, the existence of a wife is necessary for the performance of certain religious ceremonies, for example *agnihotri*, which cannot be performed unless there is a wife Siromani, *Hindu Law*, p 156, 158 A second marriage of a Hindu is therefore necessary and enjoined by the *shastras* For secular purpose, too the marriage was desirable and proper The age of the widower was only 28 and he had a child to be looked after As to the *asura* form of marriage, all that *Manu* lays down is that one should not take anything as the price of his daughter The marriage, though condemned, is quite valid The father of the bride is prohibited from taking money for the marriage, but the bridegroom is not prohibited from making a payment In the *arsha* form of marriage, which is an approved form, the payment is made in kind instead of in cash, that is the only difference which is not one of principle but of detail The loan was expressed to be taken for "marriage expenses" (*bazarurat anjam kar shadi*) That would be a legal necessity, and the creditor was not bound to see to the application of the money In the case of *Jairam Nathu* v. *Nathu Shamji* (4) it was held that the expenses of the marriage of younger brothers were a legal or family necessity The uncle, Bindeshri Singh as head of the joint family, was bound to perform the marriage of his nephew Bhagwati Singh There is no essential difference between a first and a second marriage The religious ceremonies are the same in both cases

(1) (1907) I. L. R. 32 Bom., 81
(2) (1903) I. L. R., 27 Mad., 206
(3) (1908) I. L. R., 32 Bom., 348.
(4) (1906) I. L. R., 31 Bom., 54.

Munshi *Govind Prasad*, for the respondent, was not called upon.

1909

SHAHZADE SINGH v. MUHAMMAD MEHDI ALI KHAN

KNOX, A. C. J. and RICHARDS, J.:—We agree with the view taken by our learned brother in this case. The matter now raised has been decided more than once by this Court in the same way and we are not disposed to take any other view, which might well open a door to fraud. The appeal is dismissed with costs.

*Appeal dismissed.*

---

*Before Mr. Justice Banerji and Mr. Justice Alston.*

1909
*August 5*

CHITTAR MAL AND ANOTHER (PLAINTIFFS) v. BIHARI LAL AND OTHERS (DEFENDANTS).*

*Act No. XV of* 1877 (*Indian Limitation Act*) *schedule II, article* 85—"*Current mutual account*"—*Limitation.*

*Held* that a "mutual" account within the meaning of article 85 of the second schedule to the Indian Limitation Act, 1877, is an account of dealings between two parties which are such as to create independent obligations in favour of one party against the other. *Ganesh* v. *Gyanu* (1) and *Ram Pershad* v. *Harbans Singh* (2) followed. *Bhawan Singh* v. *Tika Ram* (3) referred to.

THIS was a suit for the recovery of a sum of Rs. 1,235-15-6 as the balance of an account subsisting between the parties. The plaintiffs alleged that an account of dealings between them and the defendants was opened on Maghsar Sudi 9th, Sambat 1956, corresponding to the 11th December 1899, and that on the 13th of August 1904, the account was stated between the parties and a balance of Rs. 2,394-9-3 was struck in favour of the plaintiffs; that subsequently the plaintiffs realised Rs. 1,479-10-6 on account of the price of wheat sold by them for the defendants, and the defendants were debited with Rs. 312-14-0 on account of interest and other charges, the amount claimed being the balance. The defendants asserted that they had no dealings with the plaintiffs and denied that any account was stated or that any sum was due by them. The court of first instance found in favour of the defendants and dismissed the suit. Upon appeal

* Second Appeal No. 616 of 1908 from a decree of Khetra Mohan Ghose, Second Additional Judge of Aligarh, dated the 30th of March 1908, confirming a decree of Ram Chandra Chaudhri, Munsif of Hathras, dated the 12th of December 1906.

(1) (1897) I. L. R., 22 Bom., 606. (2) (1907) 6 C. L. J., 158. (3) Weekly Notes, 1896, p. 186.

1910

BHAGIRATHI v. JOKHU RAM UPADHIA.

Munshi *Haribans Sahai*, in reply —

The neces ary *sanskara* of marri ge of a Hindu is performed and completed when he is married for the fir t time A second marriage is nei her nece sary nor required by the *sha tras* Ma riage is the last sacrament connected with the life of a Hindu. When once the sacrament is performed, no further religious ceremonie are required Especially, when a son is bego ten by him he is deemed by the *shastras* to have performed all the pious ol ligations imposed upon him in this connection Colebrooke *Digest of Hindu Law*, p 302 The son is not bound to pay the price paid by his father for the second wife If it is a prohibited form of marriage, then the borrowing of money to bring about such a marriage is opposed to public policy

RICHARDS, J —This appeal arises out of a suit to enforce a mortgage The facts are that one Madho Singh and one Bindesari Singh were own brothers Bhagwati Singh was the son of Madho Singh Bhagwati Singh married for the first time and had a son named Bhagirathi Singh, who is the principal defendant in the suit and the sole appellant in this Court The first wife of Bhagwati having died, he married a second time At the time of this marriage Bhagwati Singh and Bindeshri Singh as managing members of a joint Hindu family, executed the bond which is the foundation of the present suit The property mortgaged was joint family property, and it has been found by the courts below that the money which was raised on the bond was applied in making a payment to the father of the second wife of Bhagwati Singh In other words it was the price paid for the bride Both the courts below decreed the suit It has been contended on behalf of the appellant, first, that the marriage expense of a member of a joint Hindu family is not a legal necessity for which the family property can be pledged, secondly that even if the first marriage can be regarded as a family necessity a second marriage canno be so regarded, and thirdly, that, even assuming that a first and second marriage can be regarded as family necessities money raised for the purpose of purchasing a bride can, under no circumstances be considered a family necessity The first point was not very strongly pressed, and the only authority was the case of

schedule II of Act No. XV of 1877, the claim was not time-barred. If what is contended for on behalf of the plaintiffs is correct, the account between the parties would be a mutual, open and current account. Upon the findings of the court below that no account was stated by the parties and no balance was struck, the account remained open, and if dealings continued between them it was a current account. We have then only to consider, whether it was a mutual account. It was held in *Ganesh* v. *Gyanu* (1), that "the dealings to be mutual must be transactions on each side creating independent obligations on the other, and not merely creating obligations on one side, the other being merely discharges of these obligations. The test of a shifting balance, sometimes in favour of one party and sometimes in favour of the other, though valuable as an index of the nature of the dealings, is not by itself always decisive." The same view was held by the Calcutta High Court in *Ram Prasad* v *Harbans Singh* (2) In *Bhawan Singh* v *Tika Ram* (3) this court held that article 85 of schedule II of Act No XV of 1877 applies to a case where the course of business has been of such a nature as to give rise to reciprocal demands between the parties. If, therefore, in this case the dealings between the parties were such as to create independent obligations in favour of one party against the other, the account between them was a mutual account, and in that case limitation would run, under article 85, from the close of the year in which the last item admitted or proved was entered in the account. It is true that in the plaint the plaintiffs put forward the case of an account stated, but having regard to the allegation in the plaint that there was an account between the parties and to the further fact that the account produced by the plaintiffs might be considered to be an open, current and mutual account, the court ought to have determined whether the account was of that description and whether there was a balance due to the plaintiffs from the defendants This was not done by the lower appellate court, although it found that there were dealings between the parties We think that the case should go back to the court of first instance for the purpose

1909

CHITTAR MAL v. BIHARI LAL.

(1) (1897) I. L. R., 22 Bom., 606. (2) (1907) 6 C. L. J., 158.
(3) Weekly Notes, 1896, p. 186.

1910

BHAGIRATHI v. JOKHU RAM UPADHIA.

*Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (1) In that case a Bench of the Madras High Court held that an alienation by a Hindu father for the purpose of defraying the marriage expenses of one of his sons was invalid. This ruling was considered by the Bombay High Court at the case of *Sundrabai* v. *Shivnarayana* (2) The judgement of the Court was delivered by Mr Justice CHANDAVARKAR, and the learned Judge points out that the Madras High Court proceeded on a misinterpretation of the texts relied on in their judgement. He also points out that the sacraments were not complete until after the marriage of the son had been duly celebrated. I entirely agree with the judgement of the learned Judge He was, however, dealing with the case of a first marriage, and it has been contended that where a member of a joint Hindu family has been legally and properly married for the first time, all the sacraments enjoined by the Hindu religion have been performed, and that a second marriage, no matter how desirable, is no longer necessary for the celebration of these sacraments, and that, therefore, even admitting that the ruling of the Madras High Court cannot be supported, a second marriage is not a family necessity At page 95 of the judgement reported in I. L R., 32 Bom., 81, the learned Judge says:—" After this I need perhaps hardly add, that to those who are familiar with the usages of joint Hindu families, the proposition that the marriage of a coparcener in such a family does not constitute a family purpose so as to make all the coparceners liable for the expenses of the marriage, must appear startling. The very idea of a joint Hindu family is that it must be kept up and continued *as long as the family is joint and all the coparceners* wish to continue joint in estate; in the marriage of each coparcener for that purpose every other coparcener is interested; and so far as I am aware, it is upon that principle that the mutual relations of coparceners in Hindu families have been regulated up to this day." Although the learned Judge was dealing with the case of a first marriage, it seems to me that the view expressed in the passage above quoted, coming as it does from a very learned Hindu Judge, is entitled to very great weight. There can be no

(1) (1903) I. L. R., 27 Mad., 206. (2) (1907) I. L. R., 32 Bom., 81.

Bechan Tiwari, was of age. The sale-deed was thus operative as regards ⅗ths of the property only. The remaining ⅕th was conveyed to the same vendee by a second sale-deed executed by Bechan Tiwari five months afterwards. The plaintiff brought a suit for pre-emption of the whole property in respect of both the sale-deeds. He impleaded as defendants the vendee and the vendors respectively of both the sale-deeds, as also one Tota, a rival pre-emptor in respect of both the sales. The courts below dismissed the suit on the ground of misjoinder of parties and of causes of action.

The plaintiff appealed.

Rai *Brij Narain Gurtu* (for Babu *Iswar Saran*), for the appellant, contended that there was no misjoinder of parties and of causes of action. Section 45 of the Code of Civil Procedure of 1882 permitted the joinder of such causes of action. The real defendant, the vendee of both the sale deeds, was one and the same person. The vendors were only *pro formâ* defendants and were not necessary parties. It was optional with the plaintiff to make them defendants or not. He cited *Hira Lal* v. *Ramjas* (1), *Lok Singh* v. *Balwan Singh* (2) and *Ram Sarup* v. *Sital Prasad* (3). The vendors were not necessary parties. If the suit without them would not be bad, merely impleading them as parties would not make the suit bad for misjoinder. The two transactions were of the same nature; they related to different portions of the same property; the vendee was the same in both. Such causes of action were allowed to be joined together against the same defendant, the vendee; *Ambika Dat* v. *Ram Udit Pande* (4), *Raghubar Dayal* v. *Jwala Singh* (5). In any event the court ought not to have dismissed the suit altogether, but should have allowed the plaintiff an opportunity to amend the plaint; *Baij Nath* v. *Chhowaro* (6). The court could at any time amend the plaint by ordering that the names of unnecessary parties might be struck off.

Babu *Benode Behari* (with him Babu *Purushottam Das Tandan* for the Hon'ble Pandit *Madan Mohan Malaviya*), for

(1) (1883) I. L. R., 6 All., 57.
(2) Weekly Notes, 1903, p. 239.
(3) (1901) I. L. R., 26 All., 549.
(4) (1895) I. L. R., 17 All., 274.
(5) (1903) I. L. R., 25 All., 229.
(6) (1903) I. L. R., 26 All., 218.

1910

BHAGIRATHI v. JOKHU RAM UPADHIA.

doubt that it is desirable, and it is the natural condition of every adult male member of a joint Hindu family, that he should be married. In the case of a Hindu whose wife had died before the birth of a son it would be considered a great calamity if he could not marry a second time So long as the family is joint, the marriage expenses must come out of the family property The very essence of a joint undivided family is that all the property is joint In the present case I think I am entitled to assume and ought to assume that a second marriage from the family point of view of Bhagwati Singh was desirable He was apparently about 28 years of age and had only one son, the appellant, who must at that time have been a boy of nine years of age It is true that there are no express findings on this subject, but I think the presumption is a fair presumption warranted by the circumstances of the case The evidence on the point stands unrebutted. It seems to me therefore that the expenses of a second marriage of this nature is a proper family expense and such a family necessity as would warrant the managing member of the family in pledging the family estate

The last point is the question whether, assuming all this the raising of money for payment of the price for the bride can be regarded as a legitimate marriage expense The form of marriage where money is paid for the bride is called the *Asura* form There is no doubt that this is one of the forms of marriage which is not approved. On the other hand it cannot be argued for one moment that such a marriage is illegal or that the children of such a marriage are illegitimate It has been conceded in argument that once such marriage is performed it is valid as any other form of marriage It is also admitted that in many parts of India, particularly in those parts where the male population exceeds the female, this form of marriage is quite common even amongst Brahmins At page 93 of Mayne's Hindu Law, 7th edition, the author quotes Manu :—"Let no father, who knows the law, receive a gratuity however small, for giving his daughter in marriage, since the man, who, through avarice, takes a gratuity for that purpose is a seller of his offspring" The learned vakil for the appellant also relied on a passage from Mayne's Hindu Law at pages 389 and 390 where the learned

the sales. He thus disputed the plaintiff's claim solely on the ground of misjoinder. This plea prevailed in both the courts below; hence this appeal.

We may observe in the first place, that if there was a misjoinder of parties and causes of action the suit ought not to have been dismissed, but the court should have amended the plaint and allowed the plaintiff to proceed with the claim in respect of one of the sales. We are, however, of opinion that there was no misjoinder such as would be fatal to the hearing of the suit. Under section 45 of the Code of Civil Procedure, 1882, separate causes of action might properly be joined together against the same defendants, provided that the provisions of section 44 were not contravened. There is no question of the application of section 44 in this case. Each sale was a distinct cause of action as against the vendee, and, as the vendee in regard to each sale was the same individual, the plaintiff was competent to unite different causes of action in one suit against the same vendee. The court below, in holding the contrary, has relied upon the decision of this Court in *Bhagwati Prasad Gir* v. *Bindeshri Gir* (1). This case no doubt supports the view of the court below, but we may observe that Mr. Justice OLDFIELD who was one of the learned judges who decided that case, held the contrary, sitting with Mr. Justice BRODHURST, in *Kalian Singh* v. *Gur Dayal* (2), and expressed the opinion that one suit could be brought in respect of several sales against the same vendee and that this procedure would be justified by the provisions of section 45. In our opinion claims for pre-emption in respect of more sales than one can be joined together against the same vendee in one suit. This would not offend against the provisions of section 44 and is permissible under section 45. Such a procedure would prevent multiplicity of actions. It is true that in *Kalian Singh* v. *Gur Dayal* (2) it was held that where there were different vendors, the result of their being joined together in the same suit would be a misjoinder of defendants, but in that case it was not considered whether the vendors were necessary parties to the suit. If the vendors were not necessary parties, their being joined with the vendee was

(1) (1883) I. L. R. 6 All. 106. (2) (1881) I. L. R. 4 All., 163.

author refers to certain debts which are not payable by sons One class of debts is said to be Çulka ' which is sometimes translated as toll The author says 'another meaning of the word 'Çulka,' translated toll, is a nuptial present given as the price of a bride, and this has been determined not to be repayable by the son, apparently on the ground that it constitutes the essence of one of the unlawful forms of marriage" We have been unable to find any authority for the above proposition It seems to me that, bearing in mind that this form of marriage is quite common and that the purchase of a bride in this sense is quite common, we cannot hold that the money which was raised was not part of the expenses of a legal marriage With regard to the text of Manu already cited, it is evident that the text of Manu has *only been regarded as a disapproval of that* particular form of marriage and not as forbidding it Furthermore the injunction is an injunction to the father of the girl against receiving the money and not an injunction against the husband from paying it I would dismiss the appeal

TUDBALL, J—I fully concur, and have very little to add I do not think that in all cases of second marriage a court will be able to hold that the second marriage constitutes "lawful family necessity" A first marriage beyond all doubt does constitute a "lawful family necessity" for the reasons given by Mr Justice CHANDAVARKAR in the case of *Sundrabai* v. *Shivnarayana* (1) But there are clearly cases in which a second marriage constitutes a family necessity equally with a first marriage in the eyes of Hindu society There is an injunction on every male Hindu who enters the form of life of a householder that he should beget a son for very clear and definite purposes There are religious ceremonies, *e g* the *agnihotri*, to be performed by a man which demand the active aid and assistance of his wife There are many instances of a Hindu wife dying in her childhood and I think it would be repugnant to the ideas prevailing among Hindus to hold that a second marriage in such a case would not be an absolute necessity or to hold that the defraying of expenses of such a marriage would not be a lawful and proper charge on the family A member of a joint Hindu family in

(1) (1907) I. L. R., 32 Bom., 81

# FULL BENCH.

1909
*August 7*

*Before Mr Justice Sir George Knox Mr Justice Richards and Mr Justice Alston*

DARYAO SINGH (PLAINTIFF) v BHARAT SINGH AND OTHERS (DEFENDANTS) *

*Suit for pre emption of sale of mortgaged property—Property in possession of usufructuary mortgagee—Possession not claimed—Act No VII of 1870 (Court Fees Act) section 7 paragraphs (v) and (vi)*

*Held* that in a suit for pre emption of a sale of land the fact that the land is subject to a usufructuary mortgage and immediate possession cannot be obtained, or is not in fact sought does not prevent the application of section 7 (vi) of the Court Fees Act to the suit but the plaintiff must pay court fees upon the value of the land computed in accordance with section 7 (v) of the Act *Ram Raj Tewari v Girnandan Bhagat* (1) distinguished

THE facts out of which this appeal arose were as follows —

On the 5th December, 1906, the defendants 1 and 2 sold their equity of redemption in certain property to the other defendants for Rs 20,000 The same property was usufructuarily mortgaged to one Ilahi Bakhsh for Rs 79,050 on 19th June, 1877 The plaintiff sued on 5th December, 1907, to pre-empt the sale of the 3rd December, 1906, and alleged that the true sale consideration was Rs 5,000 He did not claim possession of the property, and paid an *ad valorem* court fee of Rs 274 on Rs 5,000 The first court being of opinion that the court fee should be paid in accordance with the provisions of section 7, paragraphs (v) and (vi) of Act No VII of 1870, ordered the plaintiff to make good the deficiency of Rs 975 on or before 19th December, 1907 The deficiency was made good, but the court on the authority of *Jainti Prasad* v *Bachu Singh* (2) dismissed the suit on the ground that there was no properly stamped plaint presented within the period of limitation The plaintiff appealed and again paid court fees *ad valorem* on Rs 5,000 only The District Judge on 24th July, 1908, passed an order directing the plaintiff to make good the deficiency of Rs 975 on or before 10th August, 1908, and the plaintiff having failed to do so he dismissed the appeal The plaintiff presented a

* Second Appeal No 910 of 1908 from a decree of Louis Stuart District Judge of Meerut dated the 11th of August 1908 confirming a decree of Soti Raghubans Lal Subordinate Judge of Meerut dated the 25th of May 1908

(1) (1892) I L R 15 All 63 (2) (1893) I L R 15 All 65

1910

BHAGIRATHI v. JOKHU RAM UPADHIA.

doubt that it is desirable, and it is the natural condition of every adult male member of a joint Hindu family that he should be married In the case of a Hindu whose wife had died before the birth of a son it would be considered a great calamity if he could not marry a second time So long as the family is joint the marriage expenses must come out of the family property The very essence of a joint undivided family is that all the property is joint In the present case I think I am entitled to assume and ought to assume that a second marriage from the family point of view of Bhagwati Singh was desirable He was apparently about 28 years of age and had only one son, the appellant, who must at that time have been a boy of nine years of age It is true that there are no express findings on this subject but I think the presumption is a fair presumption warranted by the circumstances of the case The evidence on the point stands unrebutted It seems to me therefore that the expenses of a second marriage of this nature is a proper family expense and such a family necessity as would warrant the managing member of the family in pledging the family estate

The last point is the question whether, assuming all this the raising of money for payment of the price for the bride can be regarded as a legitimate marriage expense The form of marriage where money is paid for the bride is called the *Asura* form There is no doubt that this is one of the forms of marriage which is not approved On the other hand it cannot be argued for one moment that such a marriage is illegal or that the children of such a marriage are illegitimate It has been conceded in argument that once such marriage is performed it is valid as any other form of marriage It is also admitted that in many parts of India, particularly in those parts where the male population exceeds the female this form of marriage is quite common even amongst Brahmins At page 93 of Mayne's Hindu Law, 7th edition the author quotes Manu —"Let no father, who knows the law, receive a gratuity however small, for giving his daughter in marriage since the man, who, through avarice, takes a gratuity for that purpose is a seller of his offspring" The learned vakil for the appellant also relied on a passage from Mayne's Hindu Law at pages 389 and 390 where the learned

pre-emption was claimed in respect of the land itself and possession was sought. Here an "interest in the land" was sought to be pre-empted, and it was the value of that "interest in the land" upon which court fees had to be paid. As no special mode of the computation of such "interest in the land" had been provided for, an *ad valorem* court fee should be paid upon the market-value of that "interest in the land." Further, section 7, paragraph (v) only enacted that in "suits for possession of the land," court fees should be paid according to the value of the subject-matter. If the subject matter was only an "interest in the land" and not the "land itself" court fees should be paid upon the value of "such interest" only. He cited *Ram Raj Tewari* v. *Girnandan Bhagat* (1) and *Radha Prasad Singh* v. *Pathan Ojah* (2).

It was held that in a suit for possession by a landlord against a fixed rate tenant, court fees should be paid not on the value of the land itself but on the value of the tenant's right in the land. The Legislature adopted the view of this court that the fees should be levied on the value of the tenant's rights and merely provided a means for the computation of the value. He cited *Haidar Khan* v. *Ali Akbar Khan* (3).

He further submitted that the leading principle of taxation was that the amount of court fees levied should have relation to the amount of relief sought. The party claiming the assistance of the State should pay a tax only upon the nature of the interest he claimed and the relief he sought. Fiscal enactments should be construed in favour of the suitor and if a literal interpretation lead to hardship and anomalies such interpretation ought to be avoided. He cited *Amanat Begam* v. *Bhajan Lal* (4) and *In the matter of Sheikh Maqbul Ahmad* (5), also Maxwell's Interpretation of Statutes (3rd edn.) pp. 319, 351, 353.

Mr. *Nihal Chand* (with him Maulvi *Ghulam Mujtaba*) for the respondents, submitted that the language of section 7, paragraph (vi) of the Court Fees Act was very clear and there was no ambiguity. The section nowhere indicated that it was limited to suits in which immediate possession was claimed. It applied

(1) (1892) I. L. R. 15 All., 63.
(2) (1893) I. L. R. 15 All., 363.
(3) (1897) P. R. 18.
(4) (1886) I. L. R. 8 All. 438.
(5) (1909) I. L. R. 31 All., 294.

1909

ARDESHIRJI FRAMJI v. KALYAN DAS.

put up at the dâk bungalow, whence they went to court on the next day. Their application was dismissed on the same day, and they, after leaving the court, returned to the dâk bungalow. There they packed up their luggage and proceeded to the railway station, and were seated in the train when they were arrested in execution of the *ex parte* decree which they had that day failed to get set aside. The Subordinate Judge found on the evidence that they had tickets to Allahabad when arrested. They preferred objections to the order of arrest and contended that the arrest was contrary to the provisions of section 135, clause (2) of the Civil Procedure Code (Act V of 1908). The Subordinate Judge disallowed their objections, and they appealed to the High Court against that order.

Dr. *Tej Bahadur Sapru*, for the respondent, raised a preliminary objection that no appeal lay from the order complained of, as clause (*h*) of section 104 of the Code of Civil Procedure (Act V of 1908) prohibited an appeal from an order directing the arrest of any person in execution of a decree, but this objection was overruled.

Dr. *Satish Chandra Banerji*, (Babu *Satya Chandra Mukerji*, with him) for the appellants contended that the appellants could not be arrested while returning from court to Bombay, from which place they had come. Bombay was their ordinary place of residence, and the privilege given by section 135 continued until they reached there. They had not stayed at the dâk bungalow for any length of time. Their stay there was merely for the purpose of their case. On return from court they stopped there only to pick up their luggage; *In the matter of Siva Bum Savuntharam* (1).

The protection must be effective. They were *bonâ fide* returning home to Bombay. They wished to proceed *viâ* Allahabad for the sake of convenience; they would not forfeit their privilege by doing so; *In the matter of Soorendro Nath Roy Chowdhry* (2).

Dr. *Tej Bahadur Sapru*, for the respondent.

The omission of the word "home" or "place of residence" in section 135 is deliberate. If the contention of the other side

(1) (1881) I. L. R., 4 Mad., 317. (2) (1879) I. L. R., 5 Calc., 103.

1909

DARYAO SINGH v. BHARAT SINGH

secure Rs 79,000 The plaintiff does not seek possession of the land He admits that possession must remain in the hands of the usufructuary mortgagee until the mortgage is redeemed He came into Court seeking merely to enforce his right to pre-empt the equity of redemption He paid a court fee of Rs 275, which was calculated upon Rs 5 000, at which he valued his suit The court of first instance held that the plaintiff must pay a court fee valued upon the land itself, according to the provisions of section 7, paragraph (v) of the Court Fees Act, VII of 1870 The consequence was that the plaintiff paid an additional Court fee of Rs 975 Having paid this sum, his suit was dismissed by the first court on the ground that the plaint was not properly stamped when presented, and the proper court fee having been paid after the expiry of the period of limitation, the suit was barred The plaintiff appealed and only paid a court fee upon Rs 5 000 A second appeal was subsequently presented to the High Court, which is still pending The only question before this Bench is the question above mentioned, *viz*, what is the proper court fee having regard to the nature of the suit? The plaintiff contends it is not equitable that he should be compelled to pay the same court fee when he seeks only to enforce his right of pre emption in respect of the equity of redemption as he would have to pay if he were seeking possession of the land by right of pre-emption freed and discharged of all incumbrances It has been pointed out that the real value of what the plaintiff seeks to pre empt is Rs 5,000, while the land freed and discharged from incumbrances is probably worth near Rs 1,00,000 A ruling was cited to us, *viz*, *Ram Raj Tewari* v *Girnandan Bhagat* (1) That was a suit for possession by a landlord against a fixed rate tenant on the allegation that the tenant defendant had broken some of the conditions of the tenancy and that the plaintiff was therefore entitled to possession The suit was clearly a suit coming under section 7, paragraph (v) of the Court Fees Act A Bench of two Judges held that the mode of valuation provided by the fifth paragraph of section 7 was inapplicable and allowed a court fee to be paid upon the value of the interest which the plaintiff was seeking to recover, *viz*, the tenancy It is clear that the

(1) (1892) I L R 15 All 63

The respondents were not represented. 1910

RICHARDS and TUDBALL, JJ. :—This appeal arises out of a suit on foot of two mortgages The rate of interest was Re. 1-14-0 per cent per mensem with yearly rests. The first bond was

DEBI SAHAI v. GANGA SAHAI.

appears to be no reason for setting aside the contract of the parties save the fact that the rate of interest was 15 per cent compound interest with half yearly rests, coupled with the fact that the security was considered by the court below to be a good security. The learned Judge in reducing the interest said,—"This is in my opinion an unconscionable rate on what was apparently a perfect security The court has absolute discretion to reduce the interest in such a case even when the point is not raised." He then refers to the case of *Balkishan Das* v. *Madan Lal* (W N, 1907, p. 65) The facts of that case were very different from the facts of the present case, as will appear on a reference to the report. At the time of the execution of the bond the borrower was heavily indebted to the lender. He was an extravagant and dissipated man and the terms of the contract were undoubtedly hard and unconscionable. Not only was the rate of interest extremely high, Rs 37 8 per cent per annum with six monthly rests, but the bond contained other onerous terms As I was party to the decision in *Balkishan Das* v *Madan Lal*, and as I think the case has been a little misunderstood, I desire to say a few words on what I conceive to be the law on this question. In my opinion the court's power to interfere with contracts in cases like the present is limited to the provisions of the Indian Contract Act. Section 19A of that Act provides that "when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside, either absolutely, or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just." In order to see what is meant by the expression 'undue influence' we have to look to the provisions of section 16, clauses (1) and (2) Then comes clause (3) which is the only clause that could possibly apply to a case like the present. This clause provides that "where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other." Now assuming for the purposes of argument that the court is entitled to hold a bargain to be unconscionable merely on the ground that the rate of interest is excessive having regard to the security, it is necessary to find also that the lender was in a position to dominate the will of the borrower when the contract was entered into before any presumption arises that the contract was induced by undue influence. There is nothing in the present case to suggest that the lender was in a position to dominate the will of the borrower. See also *Dhanipal Das* v *Maneshar Bakhsh* (I. L. R, 28 All., 570) I think the appeal should be allowed.

TUDBALL, J —I fully agree. In all cases of this kind the court must look to the facts and circumstances of the case, and unless in a case there is unfai

This is our answer to the reference

The appeal was then returned to the Bench which had made the reference, by which it was dismissed in accordance with the opinion pronounced by the Full Bench

*Appeal dismissed.*

1909

DARYAO SINGH v. BHARAT SINGH

## APPELLATE CIVIL

1909 *July* 30

*Before Sir George Knox, Acting Chief Justice and Mr Justice Richards*

SHIAM LAL AND ANOTHER (PLAINTIFFS) v. RAM PIARI (DEFENDANT) *

*Act No IX of 1872 (Indian Contract Act), sections 11 64, 65, 70—Minor—Sale by a minor—Discharge of mortgage by vendees—Sale not completed—Suit by vendees to recover consideration paid*

H and R two Hindu widows, of whom R was a minor, sold a shop to the plaintiffs Registration of the sale deed was refused and the vendees thereupon sued to recover Rs 231 alleged to have been paid to certain mortgagees in discharge of a mortgage on the shop and Rs 100 as paid in cash to the vendors and they asked for sale of the shop *Held* that the sale being by a minor the plaintiffs acquired no interest to support their discharge of the mortgage and that the remaining sum of Rs 100 not having been paid for necessaries was also not recoverable.

THIS was a suit to recover Rs 346-1 by sale of a shop The facts were briefly these —The shop in dispute was the property of two brothers Chhote Lal and Bhagwan Das Both the brothers died about the same time leaving them surviving their mother, Musammat Hulaso, Musammat Ram Piari, widow of Chhote Lal, and Musammat Goma, daughter of Bhagwan Das Musammats Hulaso and Ram Piari executed a sale deed of the shop in suit in favour of the plaintiffs on September 20, 1903, in lieu of Rs 600 The consideration was made up thus

(1) Rs 100 for the maintenance and support of the defendants

(2) Rs 231 paid to Mattru Mal and Basdeo, who held a mortgage over the shop and a house, created by Bhagwan Das and Chhote Lal on December 12, 1903

(3) Rs 269 left in deposit for the vendors

The plaintiffs then applied to have the sale deed registered, but registration was refused on the ground that Ram Piari was a minor Thereupon the plaintiffs brought the present suit to recover the first two items with interest Ram Piari alone defended the suit and it was contended on her behalf that she was a

* Appeal No 27 of 1908, under section 10 of the Letters Patent.

1910

Debi Sahai v. Ganga Sahai.

dated the 5th of August, 1897, for Rs. 215, and the second was dated 5th December, 1899, for Rs. 99. The total amount claimed was Rs. 1,270-9 0 after allowing payment of Rs 150. The only question is whether or not the court below was justified in reducing the interest from the contractual rate of Re 1-14 0 per cent per mensem compound interest with yearly rests to Rs 24 per cent. per annum simple interest. The learned Judge says:—The defendants pleaded that the rate of interest was hard and unconscionable," and he then goes on to cite cases upon which he relies as authorities for the proposition that the court can of its own motion reduce interest as unconscionable. He says:—"It has been laid down that in the case of an unconscionable bargain a court can interfere in the absence of undue influence or penal clauses to reduce interest. There can be no doubt that the learned Subordinate Judge had discretion to reduce interest" It will be seen that it was neither pleaded nor proved that there was any undue influence or any penalty. In the judgement of this Bench delivered on the 16th of May, 1910, in Second Appeal No 891 of 1909, we pointed out that the power of a court to interfere with contracts is limited to the provisions of the Contract Act. There are dicta to be found in the cases of *Balkishen Das* v *Madan Lal* (1) and *Kirpa Ram* v. *Sami-ud-din Ahmad Khan* (2) which seem to us liable to misconstruction. These dicta must be read in conjunction with the facts of the cases. We therefore think it right to refer to the decision of their Lordships of the Privy Council in the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (3) At page 583 of the report their Lordships,

---

dealing, the court must enforce the contract made by the parties In the present case there is absolutely nothing to suggest that there was undue influence of any sort or any unfair dealing on the part of the lender, and I can see no just reason why any relief should be given to the debtor under these circumstances I would also admit the appeal

By the Court —Order of the Court is that we allow the appeal, modify the decrees of both the courts below and decree the plaintiffs' claim for Rs 903-8 0 plus simple interest from the date of suit at 6 per cent. per annum as the plaintiffs waited for a long time We direct that the parties abide their own costs in all courts We extend the time for payment to the 16th of November, 1910

(1) Weekly Notes 1907, p 65 (2) (1903) I. L. R., 25 All., 234.
(3) (1906) I L. R., 28 All., 570

protect, and therefore the payment made by them in discharge of the mortgage was nothing more than a payment by a volunteer The learned vakil for the appellants has relied upon a passage in Pomeroy's *Equity Jurisprudence*, Vol. III, paragraph 1212. The passage it seems to me is against his contention There the learned author says — Such relations must exist towards the mortgaged premises or with the other parties that the payment is not merely a voluntary act, but is an equitably necessary or proper means of securing the interest of one making it from possible loss or injury The payment must be made by or on behalf of the person who had some interest in the premises or some claim against other property which he is entitled in equity to protect and secure A mere stranger therefore who pays off a mortgage as a merely voluntary act can never be an equitable assignee. ' As I have already said the plaintiffs acquired no interest in the shop in question under the sale-deed said to have been executed in their favour by Musammat Ram Piari the latter being a minor Therefore they had no interest to protect, and if they made any payment to discharge a mortgage existing on the property it was a voluntary act on their part and does not confer on them any right to recover the money so paid by them from the mortgaged property The Privy Council has held in the case referred to above that in the case of a contract by a minor which is void the person advancing money on the contract cannot recover it under the provisions of sections 64 and 65 of the Contract Act Therefore from any point of view the plaintiffs are not entitled to get back the sum of Rs 231 alleged to have been paid by them to the mortgagor As for the remaining sum of Rs 100 which is said to have been paid by them in cash it is contended that the payment was made for necessaries That was not the case set up in the courts below All that was said was that the money was paid for the maintenance of the vendors That does not amount to a payment for necessaries and cannot create any lien in favour of the plaintiffs on the minor s property I therefore agree with the conclusion at which the court below has arrived and dismiss the appeal with costs

From this judgment an appeal under the Letters Patent was preferred by the plaintiffs

Dr *Satish Chandra Banerji* (for Babu *Jogindro Nath Chaudhri*), for the appellants The learned judge is wrong in holding that the appellants were mere volunteers, and so could not be equitable assignees The mortgage which had been paid off by them was binding on the defendant, and they paid it off for her benefit and at her instance A person acting as the appellants have done is not a volunteer It is not necessary that there should have been some previous interest, Pomeroy, *Equity Jurisprudence*, 3rd edition, section 1212, p 2423 The right of subrogation is an equitable right and does not depend upon the capacity of the parties to enter into a contract, *Spaulding* v. *Harvey* (1), Jones, *Mortgages*, 6th edition, section 874, *(a)*, *(b)*,

(1) (1891) 13 L R A, 619, 621.

referring to the decision of the Subordinate Judge which had been confirmed by the Judicial Commissioner of Oudh, said as follows:—"The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered the terms of the amended section 16 only." The Contract Act is referred to. It is quite clear that it is only under section 16 in cases like the present that the court has power to interfere with a contract entered into by the parties. The section is limited to contracts induced by undue influence. A contract induced by undue influence is defined by section 16, clause (1) of the Contract Act. Clause (3) is the only clause which refers to unconscionable bargains, and in applying the provisions of the section it will be seen that it is only where the lender is in a position to dominate the will of the borrower that a presumption arises that a transaction which on the face of it appears to be unconscionable was induced by undue influence. In the present case, as already pointed out, undue influence was neither pleaded nor proved, nor is there anything whatever to show that the plaintiffs were in a position to dominate the will of the borrowers. Under these circumstances we allow the appeal and modify the decrees of the courts below by decreeing the plaintiffs' claim in full. As the rate of interest was in our opinion very high, we allow no interest from the date of suit. The appellants must have their costs.

*Appeal allowed.*

Contract Act, was not distinctly relied upon before the single Judge. That section, however, does not apply as it presupposes an existing interest in the person who claims its benefit. It is submitted that the section is not meant to apply to the case of a person with whom there can be no contract at all. A cash payment can never be called 'necessaries" and cannot be recovered.

Dr. *Satish Chandra Banerji*, in reply:—In the case in I. L. R., 30 Calc., 539, sections 64 and 65 of the Contract Act were held to be inapplicable, although it was observed that if a proper case under section 41, Specific Relief Act, were made out, relief might be given. The money lender was not allowed to recover anything that he had paid under the contract, under the special circumstances of that case. In the case of *Thurston* v. *Nottingham Permanent Benefit Building Society*, (1) the court of appeal held the Building society entitled to recover the money which had been paid for the minor to her vendor who had acquired a lien for unpaid purchase money, although the mortgage itself was declared void. The analogy applies to this case. The mortgagees had a valid lien and it had been discharged by the appellants. They are entitled to step into the shoes of the former. As for the contention that section 70 does not apply to the case of a minor, it is submitted that the section occurs in a chapter of the Act which treats of relations resembling contracts. A comparison with section 65 shows that the later section is intended to provide for a case where there is neither an agreement nor a contract. Section 68, it has been held in *Mohori Bibee's* case, provides for the case of a minor. It is submitted that all these are cognate sections which deal with cases of *quasi*-contract, as distinguished from contract. There is no agreement between the parties, but relief is afforded on the ground of unjust enrichment, the defendant having profited at the expense of the plaintiffs. The Indian Law has been deliberately made wider than the English Law, and even under the latter law it is only when a payment has been made *against the will or without the consent* of the other party that a person is not permitted to make

(1) (1902) 1 Ch. 1; (1903) A. C. 6.

1910
May 23.

*Before Mr Justice Tudball and Mr. Justice Chamier.*

RAM BARAN RAI AND OTHERS (DEFENDANTS) *v.* KAMLA PRASAD (PLAINTIFF) AND MUSAMMAT RAJWANTI KUAR (DEFENDANT) *

*Hindu Law—Mitakshara—Succession—Samanodakas—Bandhus—Cause of action*

*Samanodakas* are those who participate in the same oblations of water and include descendants from a common ancestor more remotely related than the thirteenth degree from the *propositus* A sister's son is only a *bandhu*. A *samanodaka* is a nearer heir to a deceased Hindu than a *bandhu* and will exclude the latter Where therefore B was in the thirteenth degree from the common ancestor L and D was in the fourteenth degree from him and B's widow executed a deed of compromise declaring that after her death D would become entitled to the possession of B's property, *held* that this gave no cause of action to B's sister's son for a suit for declaration of title and cancellation of the deed. *Bai Devkore* v. *Amritram Jamalram* (1) referred to.

THE facts of this case were as follows:—

On the death of Bindachal Rai, the last owner of the property in dispute, his mother, Musammat Rajwanti, succeeded to it and got possession. A dispute arose as to the succession between her and the present appellants who claimed to be entitled to the property. They brought a suit against her for possession; this suit was compromised. The compromise "recognized the right" of the Musammat to remain in possession during her life-time, and declared that on her death the present appellants would be entitled to succeed as the nearest reversioners They were of the 14th degree of lineal descendants, counting from the common ancestor, Lala Rai. Thereupon the first respondent, Kamla Prasad, who was the son of a sister of Bindachal Rai, brought the present suit against both the parties to the former suit, on the allegations that he was a nearer reversioner than the appellants and that the former suit and the compromise were collusive. He therefore prayed for a declaration that he was the next heir and that the compromise was void and ineffectual as against him. Both the lower courts held that the plaintiff, being a near *bandhu*, was a nearer reversioner than the defendants, and partly decreed his claim. The defendants appealed.

* Second Appeal No 505 of 1909 from a decree of Sri Lal, District Judge of Ghazipur, dated the 20th of April, 1909, confirming a decree of Chhajju Mal, Subordinate Judge of Ghazipur, dated the 14th of January, 1909

(1) (1885) I. L. R., 10 Bom., 372.

RICHARDS and ALSTON, JJ —This is an application in revision to set aside two orders, dated respectively, the 17th and 19th of May, 1909, purporting to have been made under the provisions of section 176 of the Code of Criminal Procedure That section provide that "when any Civil, Criminal, or Revenue court is of opinion that there is ground for inquiring into any offence referred to, in section 195 and committed before it, or brought under its notice in the course of a judicial proceeding," such court may send the case for inquiry or trial to the nearest Magistrate of the first class

The petitioners contend that the proceeding in which the offence in question is alleged to have been committed, was not a proceeding in a Civil, Criminal, or Revenue court, nor was the *matter brought under the notice of the court in the course of a* judicial proceeding, and that being so, there was no jurisdiction to make the order complained of As neither of the lower courts have set out the course of the proceedings which culminated in the final orders now challenged in revision, we have had some difficulty in dealing with this application So far as we have been able to ascertain however, the facts appear to be as follows —A report was made at the Jaswantnagar thana, that the *head master of the school there had been guilty of a certain* offence The Sub-Inspector reported the matter, and apparently considered that the case was not a true one The District Magistrate must have received notice of this report, for he verbally directed the Officiating Superintendent of Police to inquire into the case This appears from the opening words of the Superintendent's report The Superintendent went to the place and held an investigation and came to the conclusion that the charge was *not a true one He however, suggested that a Magistrate should* be sent to inquire into the matter The District Magistrate therefore ordered a Deputy Magistrate of the first class to proceed to the spot and hold a magisterial inquiry into the case This the Deputy Magistrate did, with the result that he came to the conclusion that the case was entirely false He made a report to that effect and recommended, amongst other things, that certain witnesses who had supported the charge on oath in the course of his inquiry should be prosecuted for giving false evidence. The

Mr *M L Agarwala*, for the appellants —

The plaintiff, who is a sister's son, is a *bandhu*. According to the Mitakshara the order of succession is as follows —*Sapindas*, then *Sakulyas*, then *Samanodakas*, and after them *Bandhus* Mayne *Hindu Law*, 7th Edition, paragraphs 574 and 575 The appellants are *samanodakas* This class extends not only to seven degrees beyond the *sakulyas*, but even further, so long as the pedigree can be traced A lineal descendant, however far down the genealogical table he may be, is a *samanodaka*, so long as he can trace his descent from a common ancestor Mayne *Hindu Law*, 7th Edition, paragraph 574 Sarvadhikari *Principles of Hindu Law of Inheritance* (Tagore Law Lectures, 1880), pp 656 686 687 *Bai Devkore* v *Amritram Jamiatram* (1) The Mitakshara Chapter II, section 5, pl 6 The effect of the compromise was to confirm the possession of Musammat Rajwanti for her life and to declare that, after her, the appellants would be the next reversioners This was entirely in accordance with what the position of the parties was according to the Hindu Law There was no collusion and no infringement of the right of any one

Munshi *Haribans Sahai*, for the respondents —

The plaintiff is the next reversioner, and not the appellants The appellants are not *samanodakas*, as they are more than seven degrees beyond the *sakulyas* The class of *samanodakas* includes only those who are within seven degrees from the *sakulyas* Ghose *Hindu Law* p 125 Golap Chandra Sarkar *Hindu Law*, p 64 Even if the plaintiff be held not to be the next reversioner, he has under the circumstances of the case, a right to sue A remote reversioner can sue where the near reversioner colludes with the widow *Rani Anund Koer* v *The Court of Wards* (2) In the compromise Musammat Rajwanti assented without demur to the assertion, by the other side, of their *present* ownership of the property, over which they professed to give her possession for life, not because she was entitled to it, but merely in *lieu* of maintenance The following cases are in my favour — *Bakhtawar* v *Bhagwana* (3) and *Sheo Singh* v *Jeoni* (4)

(1) 1885) I L R 10 Bom. 372
(2) (1880) L R 8 I A 14 I L R 6 Calc 764
(3) (1910) I L R 32 All. 176 (178)
(4) (1897) I L R 19 All., 524

*it is* only fair to him to say that the grounds taken before him *in revision* were not calculated to bring those difficulties before him He, however, expended an unnecessary amount of time and labour in dealing with those grounds. It would have been quite sufficient to have remarked that they were misleading and unsubstantial without drawing up a proceeding on the subject.

We allow this application and set aside the orders of the 17th and 19th May, 1909, and any orders that may have resulted from them.

*Application allowed.*

## APPELLATE CIVIL.

1909
*August 7.*

*Before Mr Justice Banerji and Mr Justice Tudball.*

SHIB SHANKAR LAL AND ANOTHER (DEFENDANTS) v SONI RAM (PLAINTIFF) *

*Act No XV of 1877 (Indian Limitation Act), section 19, schedule II, articles 120, 148—Acknowledgment—Acknowledgment by widow in possession of husband's estate not binding on reversioner—Limitation—Act No. XIV of 1859 (Limitation), section I, clause 15*

*Held* that the widow and daughter of a mortgagee in possession as such of the mortgaged property are not competent to give an acknowledgment of the title of the mortgagor so as to save limitation within the meaning of the Indian Limitation Act, 1877, in respect of a suit for redemption brought by the representative in interest of the original mortgagor against the reversioners. *Bhagwanta* v. *Sukhi* (1) and *Chhiddu Singh* v. *Durga Dei* (2) referred to.

*Held* also that, unless there is a distinct provision to the contrary, the validity of an acknowledgment set up by a plaintiff as saving limitation in his favour must be decided with reference to the law in force when the suit is brought, and not with reference to that in force when the acknowledgment was made. *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (3) referred to.

THIS was a suit for redemption. The material facts are as follows:—

Dalip Singh and others, owners of 20 biswas of Khira Buzurg, made a usufructuary mortgage thereof in favour of Khushwakht Rai on January 2nd, 1842. After Khushwakht Rai's death his widow Musammat Jamna came into possession of the mortgaged property and she sub mortgaged 10 biswas to Gulab Rai and Debi

* Second appeal No 635 of 1908 from a decree of H J. Bell, District Judge of Aligarh dated the 24th of March 1908, confirming a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 16th of September 1907.

(1) (1899) I. L R, 22 All, 33. (2) (1900) I. L R, 22 All, 382
(3) (1883) I. L R, 7 Bom, 459.

1910

RAM BARAN RAI v. KAMLA PRASAD.

Mr. *M. L. Agarwala* was not heard in reply; but he referred to Mayne: *Hindu Law*, 7th Edition, paragraph 648.

TUDBALL and CHAMIER, JJ:—This appeal arises out of a suit brought by the plaintiff claiming as the next reversioner to Bindachal Rai to obtain a declaration that he is entitled to the estate of the deceased after the death of his maternal grand-mother, Musammat Rajwanti Kunwar, and that the deed of compromise, dated the 5th of June, 1903, was void and ineffectual as against him. In paragraph 5 of the plaint he stated that the defendant, first party, had brought a suit against Rajwanti Kunwar to recover possession of the property left by Bindachal Rai; that they colluded, and on the 5th of June, 1903, filed a compromise in the suit to the effect that the defendant, 2nd party (i. e., Rajwanti Kunwar) would remain the owner and possessor of the property left by Bindachal Rai as long as she was alive, and that after her death the defendants, first party, would become entitled to the possession of the aforesaid property. In paragraph 6 the plaintiff urged that this compromise was prejudicial to him as according to Hindu Law he is the heir of Bindachal Rai and the defendants, first party, could not in any way be deemed to be his heirs. With the plaint was filed a pedigree which will be found at page 7 of the paper book. In this pedigree one Lala Rai is shown as the common ancestor from whom Bindachal Rai and also the defendants, Rambaran Rai, Sita Ram Rai, and Swarath Rai are descended. Bindachal Rai is shown as being in the thirteen degree from Lala Rai, while the defendants are shown in the fourteenth degree from him. The defendants in their written statement filed another pedigree which will be found at page 9 of the paper book in which they show themselves as within 6 or 7 degrees of Lala Rai. They also raised a plea that the plaintiff was the son of Bindachal Rai's step-sister and not of his own sister. The court of first instance granted the plaintiff a declaration that the compromise made by Rajwanti Kunwar on the 5th of June, 1903, was collusive and that the declaration therein that the defendants were the heirs after her was not binding on the plaintiff. This decree was upheld on appeal. In this Court it is urged that on the plaintiff's own pedigree the defendants appellants are

1909

SHIB SHANKAR LAL v. SONI RAM.

Both courts decreed the claim, holding that Act XIV of 1859 governed the suit and the acknowledgment was sufficient within the meaning of that Act to postpone the running of time, and that the suit was not barred by *res judicata*.

The defendants appealed.

Pandit *Moti Lal Nehru* (with him the Hon'ble Pandit *Sundar Lal*, Munshi *Gulzari Lal*), and Pandit *Baldeo Ram Dave* for the appellants:—

Act No XV of 1877 applies to the suit. The saving clause applies to "title acquired," and the expression "title acquired" implies *title to property*, and not a *mere right to sue*. It is submitted that the Act of 1877 has a retrospective operation. Refers to section 2, Act No XV of 1877. The cases *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (1) and *Zulfikar Husain* v *Munna Lal* (2) lay down that Act No. XV of 1877 will apply to execution proceedings initiated under that Act, but upon decrees obtained when Act No IX of 1871 was in force That being so, the question is whether the acknowledgments relied upon being made when Act No XIV of 1859 was in force, by the life tenants in possession of the estate, will avail as against the defendants reversioners. Under section 19 of Act No XV of 1877, the acknowledgment should be made by "the party against whom the right is claimed, or by some person through whom he derives title or liability." The acknowledgments were not made by the defendants and they do not derive title or liability through the life-tenants. A reversioner claims through the last male owner; *Bhagwanta* v. *Sukhi* (3). It is, therefore, submitted that the suit is barred by limitation.

Assuming that Act No XIV of 1859 applies, the law requires *that the signature should have been made by the person acknowledging*. In the present case the signatures were made by the agents of the two ladies

Mr. *M. L. Agarwala* (for Mr. *B E O'Conor*), Babu *Sarat Chandra Chaudhri* (for Babu *Jogindro Nath Chaudhri*) with him, for the respondent —

It is submitted that Act No XV of 1877 cannot apply to this case. The acknowledgments in question had been made when Act

(1) (1883) I. L. R. 7 Bom., 459. (2) (1880) I. L. R., 3 All., 148.
(3) (1899) I. L. R., 22 All., 33.

the reversioners next entitled to take the estate of Bindachal Rai on the death of Rajwanti Kunwar, and that therefore the plaintiff has no cause of action to obtain the declaration which he seeks, as the compromise does nothing more than declare that the defendants are the reversioners according to Hindu Law On behalf of the respondent it is urged that the appellants cannot be the next reversioners because they are too remote from Lala Rai, the common ancestor It is next urged that under the compromise in question the mother recognized the title of the appellants as actual owners of the property on the date of the compromise, and that this was prejudicial to the interests of the plaintiff at least as a remote reversioner. In regard to the first point, on page 686 of Sarvadhikari's Principles of Hindu Law of Inheritance, it is laid down —"In default of *gotraja sapindas*, says the Mitakshara, the succession devolves on *samanodakas*, and they must be understood to reach to seven degrees beyond the *gotraja sapindas*, or else as far as the limits of knowledge as to birth and name extend" At page 778 of Mayne's Hindu Law, 7th Edition, in paragraph 574, where Mr Mayne discusses *sakulyas* and *samanodakas*, he says —"The former extend to three degrees both in ascent and descent beyond the *sapindas*, and the latter to seven degrees beyond the *sakulyas*, or even further so long as the pedigree can be traced" The same question arose before the Bombay High Court in the case of *Bai Devkore* v *Amritram Jamiatram* (1) It was there held that the word *samanodakas*, meaning literally those participating in the same oblation of water, includes descendants from a common ancestor, more remotely related than the thirteenth degrees from the *propositus* Mitakshara, chapter II, section 5, pl. 6, was quoted which runs as follows —"If there be none such, the succession devolves on kindred connected by libations of water, and they must be understood to reach to seven degrees beyond the kindred connected by funeral oblations of food or else as far as the *limits* of knowledge as to birth and name extend" It is quite clear on the authorities and on the face of the pedigree filed by the plaintiff himself that the *defendants* appellants are nearer

(1) (1885) I. L R, 10 Bom, 372.

limitation would, simply on that ground, be not binding upon the appellants Further, between 1883, when the respondent's predecessor acquired the mortgagors' right, and 1898, when the last of the widows died, the respondent was both mortgagee and mortgagor of the property The mortgagee right was acquired in 1865. Under article 148 of Act XV of 1877, there must be a party to redeem and another to be redeemed, and as there was a fusion of interests in the same person, that article will not apply, and the respondent is entitled to exclusion of the whole of that period In the alternative, the case is governed by article 120 of the Limitation Act In the latter case there was in 1901 a clear admission of the mortgagor's right by the appellants (*vide* paragraphs 8 and 9 of the plaint of that suit) and a new period therefore commenced running from then The suit for redemption is not barred Refers to 4 and 5 Will IV, C 27, section 28, *Hyde* v *Dallaway* (1), *Burrell* v *The Earl of Egremont* (2) and *Wynne* v *Styan* (3)

The bar of *res judicata* also applies to the present suit According to the appellants' contention the right to redeem became barred in 1902, and the appellants instituted a suit to set aside the alienations made by the previous life tenants in 1904 They could have claimed the whole of the proprietary right then, but instead of that they chose to take a decree for a fraction of the estate, *viz*, the mortgagee interests The right to proprietary possession was directly and substantially in issue, and they having relinquished the claim then, it is too late for them now to set it up (Section 13, Explanation II, of Act No XIV of 1882)

Pandit *Moti Lal Nehru*, in reply The whole law on the subject of limitation is contained in the Limitation Act The exceptions are laid down in sections 5 to 25, so that the suit, having been instituted after the Act of 1877 had come into operation, should be governed by that Act, unless it fell within any of the exceptions Refers to Beal *Cardinal Rules of Legal Interpretation*, 2nd Ed, 374, 375, *Taylor* v *Corporation of Oldham*, (4) Therefore, when there is a special Act providing for a

(1) (1843) 2 Hare 528, s c, 67 R R 218
(2) (1844) 7 Beav 205, s c 49 R R 1012.
(3) (1847) 2 Phillips 303 s c, 41 R. R 958
(4) (1876) L R 4 Ch, D, 395, 410.

1910

M BARAN RAI v. KAMLA PRASAD

Mr *M L Agarwala* was not heard in reply, but he referred to Mayne *Hindu Law*, 7th Edition, paragraph 648

TUDBALL and CHAMIER, JJ —This appeal arises out of a suit brought by the plaintiff claiming as the next reversioner to Bindachal Rai to obtain a declaration that he is entitled to the estate of the deceased after the death of his maternal grand mother, Musammat Rajwanti Kunwar, and that the deed of compromise dated the 5th of June, 1908, was void and ineffectual as against him In paragraph 5 of the plaint he stated that the defendant, first party, had brought a suit against Rajwanti Kunwar to recover possession of the property left by Bindachal Rai, that they colluded, and on the 5th of June, 1908, filed a compromise in the suit to the effect that the defendant, 2nd party (i e, Rajwanti Kunwar) would remain the owner and possessor of the property left by Bindachal Rai as long as she was alive, and that after her death the defendants, first party, would become entitled to the possession of the aforesaid property In paragraph 6 the plaintiff urged that this compromise was prejudicial to him as according to Hindu Law he is the heir of Bindachal Rai and the defendants, first party, could not in any way be deemed to be his heirs With the plaint was filed a pedigree which will be found at page 7 of the paper book In this pedigree one Lala Rai is shown as the common ancestor from whom Bindachal Rai and also the defendants, Rambaran Rai, Sita Ram Rai, and Swarath Rai are descended Bindachal Rai is shown as being in the thirteen degree from Lala Rai, while the defendants are shown in the fourteenth degree from him The defendants in their written statement filed another pedigree which will be found at page 9 of the paper book in which they show themselves as within 6 or 7 degrees of Lala Rai They also raised a plea that the plaintiff was the son of Bindachal Rai's step-sister and not of his own sister. The court of first instance granted the plaintiff a declaration that the compromise made by Rajwanti Kunwar on the 5th of June, 1903 was collusive and that the declaration therein that the defendants were the heirs after her was not binding on the plaintiff This decree was upheld on appeal In this Court it is urged that on the plaintiff's own pedigree the defendants appellants are

January, 1842, and the only question we have to determine is whether the claim is time barred or not.

The mortgage was made by Dalip Singh and others in favour of one Khushwakt Rai and related to the whole of the village Khera Buzurg. Khushwakt Rai died leaving a widow Musammat Jamna and a daughter Musammat Janki both of whom are now dead. The defendants Shib Shankar Lal and Charan Bihari Lal are the sons of Musammat Janki. On the 12th of November, 1865, Musammat Jamna made a sub mortgage of her mortgagee rights in favour of Akbar Ram and Daya Ram. On the 31st of May, 1866, she sold one-half of her mortgagee rights to Debi Prasad and Gulab Rai and mortgaged to them the other half, which after her death was sold to those persons by her daughter Janki on the 29th of April, 1867, so that Debi Prasad and Gulab Rai acquired the whole of the mortgagee rights.

Between the years 1880 and 1883 the mortgagors' rights in respect of 13 biswas 2½ biswansis, were acquired by the mortgagees. Under various transfers and other transactions to which we need not refer these rights as well as the rights of the mortgagees passed to Munna Lal, the father of the plaintiff, and he thus became the owner of the whole of the mortgagee rights and of the rights of the mortgagors in respect of 13 biswas, 2½ biswansis. The remainder of the mortgaged property has been redeemed by the original mortgagors, and as to this there is no controversy in this appeal.

Musammat Janki died on the 30th of May, 1898, and on the 15th of May, 1904, her sons the defendants Shib Shankar Lal and Charan Bihari Lal brought a suit against the present plaintiff to have the transfers of the mortgagee rights made by the two ladies, mentioned above, set aside and for possession of those rights. They obtained a decree on the 12th of August, 1904, and the decree was affirmed by this Court on the 4th of February, 1907.

On the 4th of March, 1907, the suit which has given rise to this appeal was brought by the plaintiff for redemption of the 13 biswas, 2½ biswansis share, referred to above. As the suit was instituted after the expiry of 60 years from the date of the mortgage, the plaintiff invoked in aid the acknowledgment of the mortgage contained in the documents executed by the two

"or by some person through whom he derives title or liability" Whilst therefore, under Act No XIV of 1859 an acknowledgment by the mortgagee or his successor in title would have saved limitation, it would have no effect under Act No XV of 1877, unless it was made by the defendant or his predecessor in title Had Act No XIV of 1859 applied to the present case, the acknowledgments by the two ladies would have been operative, as they were persons claiming under the original mortgagee It is clear that under the later Act the acknowledgments would be of no avail They were not made by the defendants, and the persons who made them were not persons from whom the defendants derive title The defendants succeeded to the mortgagee rights, as the grandsons of the original mortgagee, Khushwakt Rai, and not as the sons of their mother Janki, and acquired those rights by virtue of inheritance to their maternal grandfather, who was the last full owner It is settled law that one reversioner does not derive title from another but from the last full owner (*Bhagwanta* v *Sukhi* (1), *Chhiddu* v *Durga* (2) and the rulings of the Privy Council cited in those cases) The learned counsel for the plaintiff respondent contends that as the widow and the daughter of the mortgagee fully represented the estate they must be regarded as the persons from whom the title of the defendants was derived, and he relies on the analogy of the cases in which it was held that a decree obtained against a Hindu widow is binding on the reversioner, if there was a fair trial of the suit in which the decree was passed We are of opinion that the analogy does not apply In the case of *Katama Natchiar* v *The Raja of Shivagunga* (3) in which the above rule was laid down, their Lordships of the Privy Council said — "Their Lordships are of opinion that unless it could be shown that there had not been a fair trial of the right in that suit, or in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the zilla court by any person claiming in succession to Anga Mootoo Natchiar For, assuming her to be entitled to the zamindari at all, the whole estate

(1) (1899) I L R 22 All, 33 (2) (1900) I L R 22 All, 382
(3) (1863) 9 Moo I A 543

1910

RAM BARAN RAI v. KAMLA PRASAD.

reversioners to Bindachal Rai than the plaintiff, who, at the utmost, being a sister's son, is a *bandhu*.

In regard to the argument that the mother did more than acknowledge the rights of the appellants as reversioners, this is entirely a new case which has been put before the Court for the first time on this appeal. The plaint, the pleadings in the lower courts as well as the judgements of the lower courts show clearly how the compromise was read by the parties in those courts. We have nothing before us to show what were the pleadings and the issues in the suit which was originally brought by the defendants appellants against Musammat Rajwanti Kunwar. We have before us only the compromise that the defendant should remain in possession in lieu of maintenance during her lifetime, and that after her death the then plaintiffs would get the property as heirs and owners after Bindachal Rai. In our opinion the plaintiff has no right whatever to put forward at this late stage a new case. As the case stood in the lower court, the plaintiff claimed to be a nearer reversioner than the defendants, and on that ground sought a declaration that the compromise was not binding as against him. As has been shown above, he is a remote reversioner, and the defendants appellants on his (plaintiff's) own showing are nearer heirs to the estate of Bindachal Rai. The compromise does nothing more than acknowledge the right of the mother Rajwanti Kunwar to remain in possession for her lifetime and the right of the defendants appellants to enter into the estate on her death if they are then alive. In our opinion the plaintiff has no cause of action whatsoever for the present suit.

We allow the appeal and set aside the decree of the lower courts. The suit will stand dismissed with *costs* in all courts.

"shall be deemed to affect any title acquired" under any enactment repealed by the Act. With reference to this provision, it was held by a Full Bench of this Court in *Zulfikar Husain* v *Munna Lal* (1) that the term "title acquired" denotes a title to property as contradistinguished from a right to sue. An acknowledgment of liability only extends the period of limitation for the institution of a suit and does not confer a title to the property. Therefore according to this ruling, section 2 does not help the plaintiff and cannot save the application of the Act of 1877. The learned counsel, referring to section 6 of the General Clauses Act, 1868, contends that in the above ruling the provisions of that section were not considered. The ruling being one of the Full Bench is binding on us and must be followed. Besides, we do not think that section 6 applies, inasmuch as an acknowledgment is not a thing done in pursuance of any Act of the Legislature. The law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary, see *Gurupadapa Basapa* v *Virbhadrapa Irsangipa* (2). As Act No. XV of 1877 was in force when the suit was brought and there is no provision in it limiting or postponing its application, section 19 of that Act applies to this case. And under that section the acknowledgments relied on cannot give to the plaintiff a new start for the computation of limitation, as they were not made by the defendants or by the persons from whom they derive their title.

It is next urged that even if the acknowledgments are of no avail to the plaintiff, the claim is not time barred because there was a fusion of the interests of the mortgagor and the mortgagee in the same person between the years 1883 and 1898, that no mortgage was in existence during that period, and that article 148 of the second schedule to Act No. XV of 1877 does not consequently apply. It is contended that the suit is governed by article 120 and that the plaintiff's cause of action arose when there was a bifurcation of interests upon the death of Musammat Janki in 1898. In support of this contention a number of

(1) (1880) I. L. R., 3 All., 148. (2) (1883) I. L. R., 7 Bom., 459.

1909

ADESHIRJI FRAMJI v. KALYAN DAS

that though an order directing the arrest or detention of any person is appealable under that section, the clause specially exempts the case where such arrest or detention is in execution of a decree, and therefore no appeal lies The reason of the exception in this clause is obvious An order for arrest and detention made in execution of a decree is an order made under section 47 of the Code, being an order for the execution of the decree Such an order is a decree which is appealable under section 96 of the Code It is obvious, therefore, that the exception in clause (*h*) is entered therein because provision is made elsewhere for an appeal from an order of arrest in execution of a decree Section 104 only relates to appeals from orders which do not amount to a decree We therefore overrule the preliminary objection.

Coming to the appeal itself, the learned advocate for the appellants urges that his clients are entitled to the privilege granted by section 135 of the Code, because they had come from their home in Bombay to attend the tribunal in which their case was pending, and that at the time of their arrest they were returning home from such tribunal He quotes the ruling *In the matter of Siva Bux Savuntharam* (1) In that case a native of Patna went to Madras on the 24th of October, on account of a suit pending in which he was the plaintiff The case was adjourned on the 27th of October for seven weeks He remained in Madras on account of the suit and was arrested on the 10th of November KERNAN, J, held that under these circumstances the defendant was within the principle of privilege as a suitor and discharged him from the arrest In our opinion this was too great an extension of the scope of the privilege The principle on which it is founded is that freedom from the fear of arrest encourages willing attendance and thus tends to the advancement of justice. In our opinion the decision of KERNAN, J, is not one which would be warranted by the language of section 135. It is difficult to conceive that in that case the plaintiff was either going to, attending, or returning *from any* tribunal at the time of his arrest That ruling also seems to be inconsistent with the

(1) (1881) I. L R., 4 Mad., 317.

*Before Sir George Knox, Acting Chief Justice, and Mr Justice Tudball.* 1909 *August 1*

KAMTA PRASAD AND ANOTHER (DEFENDANTS) v MOHAN BHAGAT AND OTHERS (PLAINTIFFS) *

*Pre emption—Pre-emption a right of substitution not of re purchase—Vendor not competent to mortgage property liable to pre emption, so as to bind pre-emptor.*

The right of pre-emption being a right of substitution rather than a right of re purchase the vendee of property which is subject to a right of pre-emption cannot defeat the pre-emptive right by subsequently mortgaging the property and thus force the pre-emptor to take the property subject to a mortgage so created. *Gobind Dayal* v *Inayat ullah* (1) referred to *Serh Mal* v *Hukam Singh* (2), *Narain* v *Parbat Singh* (3) and *Deo Dat* v. *Ram Autar* (4) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgment of RICHARDS, J The facts of the case appear from the judgment under appeal, which is as follows —

"This appeal raises an interesting and important question. The facts are shortly as follows On the 7th of April, 1904, three deeds were executed—(1) a sale deed of 3½ annas share in mauza Gohni and a 10 pie share in mauza Bhitni in favour of Adit Singh and others, (2) a sale deed of two decrees in favour of Adit Singh alone and (3) a mortgage by Adit Singh of his share in the purchased property to secure the price of the decrees The present suit was instituted on foot of the mortgage The representatives of the respondents Kamta Prasad and Girja Prasad brought a suit for pre emption basing their claim upon the sale to Adit Singh and others of the 7th of April 1904 They did not make the mortgagees under the mortgage from Adit Singh parties The mortgage is however a registered deed The lower appellate court finds that when the defendants respondents pre-empted the property they had notice of the mortgage Mr *Sital Prasad* on behalf of the respondents contends that this ought not to be regarded as a finding, that there was no issue in the court of first instance upon this point, and that the court had no right to record any finding I can find no justification for this contention No objection was taken to the findings of the court below

* Appeal No 80 of 1909 under section 10 of the Letters Patent,

(1) (1885) I L R 7 All 775
(2) (1897) I L R, 20 All, 100.
(3) (1901) I L R 23 All 247.
(4) (1886) I L R, 8 All, 502.

## NOTICE TO SUBSCRIBERS.

In order that an opportunity may be afforded of investigating t cause of the non delivery of any Part or Parts of the "Indian L Reports, Allahabad Series," to subscribers, it has been found necessa to give notice that no complaint can be attended to regarding the loss any Part or Parts unless information be forwarded to the Superinten ent, Government Press, Allahabad, within three months after the dε of publication after that date back numbers can be supplied only on f prepayment and not at the reduced rate of Re 0 5-9 per copy

---

A DIGEST OF INDIAN LAW CASES containing High Cou Reports, 1862—1886 and Privy Council Reports of Appeals fro India, 1836—1886, with an Index of Cases Compiled, under the orde of the Government of India, by JOSEPH VERE WOODMAN, of the *Midd* Temple, Barrister at Law, and Advocate of the High Court, Calcutt In five volumes Price, exclusive of packing and postage, Rs 10 p volume, quarter bound copies, Rs 11

Copies can be obtained at the Office of the Superintendent Government Printing, India, Calcutta

v *Hukam Singh* and the Full Bench case of *Janki Prasad* v *Ishar Das* (1) that a vendee has a right to deal with the property up to the time the pre-emption suit is brought. If this is so, the defendants are bound by the mortgage. It is not necessary in the present appeal to decide whether or not it is necessary for the pre-emptor to pre-empt the second sale or mortgage. Possibly, it would have been sufficient in the present case, if the pre-emptors had impleaded the mortgagee, so that the sale price might not have been paid to their mortgagors behind their back. The question is by no means free from difficulty, and I give my decision with considerable hesitation. I allow the appeal, set aside the decree of the lower appellate court and remand the case under order 41, rule 23 for determination of the case on the merits. Vikrama Singh and Rajnath Singh, although they were brought on the record, have not been served and are not bound by this decision. The learned vakil for the appellants stated that he did not wish to take any steps to have them served."

The defendants thereupon appealed under section 10 of the Letters Patent.

Babu *Sital Prasad Ghosh*, for the appellants.

Munshi *Govind Prasad*, for the respondents.

KNOX, ACTING C. J., and TUDBALL, J.—The facts of the case on which the decision of this appeal turns are as follows:—

The plaintiffs, respondents to this appeal sold certain zamindari shares for Rs. 900 to Adit Singh and four others. On the same date they sold for Rs. 150 to Adit Singh alone, two rent court decrees in their favour. Adit Singh could not pay down the purchase money of this sale, and as security therefor he mortgaged to the plaintiffs his share in the property which had been purchased from them by the former of these two sale deeds. The mortgage was created on the same date, but subsequent to the sale. The present appellants brought a suit to pre-empt the zamindari. To this suit they joined as parties the vendors and the vendees, the former being the mortgagees under the subsequent mortgage.

These vendors did not defend the suit and the appellants obtained a decree conditional on payment of the full consideration

(1) (1899) I. L. R., 21 All. 374.

## V.—MISCELLANEOUS PUBLICATIONS

Table showing Effect of Legislation in the Governor General's Council during 1906 ... 3a 6p (1a)

Ditto ditto during 1907 2a 6p (1a)

Ditto ditto during 1908 4a (1a)

Ditto ditto during 1909 3a 3p (1a)

Annual Indexes to the Acts of the Governor General of India in Council for 1906 1907 1908 and 1909 The price is noted on them

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date Super royal 4to Annual subscription Rs 5 (Re 1) single issue 4a including postage

List of General Rules and Orders under Statutes and General Acts in force in British India Corrected up to 31st December, 1908 Rs 1 4 0 (3a)

Addenda and Corrigenda List No I of 1909 to the List of General Rules and Orders 3p (1a)

Ditto ditto No II of 1909 7a 6p (1a)

Chronological Tables of the Indian Statutes compiled under the orders of the Government of India by F G Wigley of the Inner Temple Barrister at Law Edition 1909 Rs 4 (8a)

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India 1901 03 with an Index of cases compiled under the orders of the Government of India by F G Wigley of the Inner Temple Bar at Law Edition 1906 Rs 10 Reduced to Rs 3 per copy ... (10a)

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India 1904 with an Index of cases compiled under the orders of the Government of India by C E Grey Bar at Law Edition 1907 Re 1 4a Reduced to Re 1 per copy ... (6a)

Ditto ditto 1905 by C E Grey Bar at Law Edition 1907 Re 1 4 Reduced to Re 1 per copy (6a)

Ditto ditto 1906 by C E Grey Bar at Law Edition 1908 Re 1 4 Reduced to Re 1 per copy ... (6a)

Ditto ditto 1907 by B D Bose, Bar at Law Edition 1908 Re 1-4 Reduced to Re 1 per copy ... (5a)

Ditto ditto 1908 by C E Grey Bar at Law Edition 1910 Rs 2 (6a)

... of Digests from 1901—1907 Reduced to Rs 7 per set of 5 volumes) ... ... (Rs 2)

...eral Rules and Orders made under enactments in force in British India consisting of General Rules Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index In three Volumes Rs 15. Reduced to Rs 10 per set (Rs 2) or Rs 5 per Volume ... ... (12a)

[illegible]

... general Contents of the Acts passed by the Governor General of India in Council in the year 1907 1a 6p (1a)

Ditto ditto 1908 ... 5a 9p (1a)

Ditto ditto 1909 ... 3a 3p (1a)

1909

KANTA PRASAD v. MOHAN BHAGAT

v. *Hukam Singh* and the Full Bench case of *Janki Prasad* v. *Ishar Das* (1) that a vendee has a right to deal with the property up to the time the pre-emption suit is brought. If this is so, the defendants are bound by the mortgage. It is not necessary in the present appeal to decide whether or not it is necessary for the pre-emptor to pre-empt the second sale or mortgage. Possibly, it would have been sufficient in the present case, if the pre-emptors had impleaded the mortgagees, so that the sale price might not have been paid to their mortgagors behind their back. The question is by no means free from difficulty, and I give my decision with considerable hesitation. I allow the appeal, set aside the decree of the lower appellate court and remand the case under order 41, rule 23 for determination of the case on the merits. Vikrama Singh and Rajnath Singh, although they were brought on the record, have not been served and are not bound by this decision. The learned vakil for the appellants stated that he did not wish to take any steps to have them served."

The defendants thereupon appealed under section 10 of the Letters Patent.

Babu *Sital Prasad Ghosh*, for the appellants.

Munshi *Govind Prasad*, for the respondents.

KNOX, ACTING C. J., and TUDBALL, J. The facts of the case on which the decision of this appeal turns are as follows:—

The plaintiffs, respondents to this appeal sold certain zamindari shares for Rs. 900 to Adit Singh and four others. On the same date they sold for Rs. 150 to Adit Singh alone, two rent court decrees in their favour. Adit Singh could not pay down the purchase money of this sale, and as security therefor he mortgaged to the plaintiffs his share in the property which had been purchased from them by the former of these two sale deeds. The mortgage was created on the same date, but subsequent to the sale. The present appellants brought a suit to pre-empt the zamindari. To this suit they joined as parties the vendors and the vendees, the former being the mortgagees under the subsequent mortgage.

These vendors did not defend the suit and the appellants obtained a decree conditional on payment of the full consideration

(1) (1899) I. L. R., 21 All. 374.

# TABLE OF CASES REPORTED.

contention is well founded In the case of *Gobind Dayal* v. *Inayat ullah* (1) the right of pre emption was defined as a right of substitution, entitling the pre emptor to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale. It is in effect as if the vendee's name had been rubbed out of the sale deed and the pre emptor's name inserted in its place It is true that the pre-emptor's right accrues on the date on which he pays into court the amount of the consideration under the pre emption decree, but the property which he secures is that which passed under the sale-deed, and not that property subject to mortgage created by the vendee subsequently to the sale, i e, he pre empts the property and not the equity of redemption (the mortgage not being one in existence at the date of the sale)

The rulings in *Serh Mal* v. *Hukam Singh* (2) and *Narain Singh* v *Parbat Singh* (3) do not govern the present case In both of those cases the stranger vendee re sold the property to a co sharer in the village (who had a right of pre emption equal to or better than that of the pre emptor), on a date prior to the institution of the suit for pre emption This, it was held, defeated the plaintiff's right to pre empt The principle on which these rulings were based is that the wrong which the plaintiff had come into court to set right, *viz*, the introduction of a stranger into the co parcenary body, no longer existed on the date of suit, having been removed by the resale to a co sharer with a pre-emptive right at least equal to that of the pre emptor That principle does not operate in the circumstances of the present suit, where a portion only of the property has been mortgaged to the original vendor who parted with his share

On behalf of the respondents it is contended that the vendee has every right to enjoy the usufruct of the property until it is pre empted and that a right to mortgage it is one of the rights of enjoyment thereof Reference is made to the case of *Deo Dat* v *Ram Autar* (4), but it was nowhere held in that case that the vendee was entitled to create a mortgage on the property binding on the pre emptor It was held that a pre emptor, before his

(1) (1885) I L R 7 All 775
(2) (1897) I L R 20 All 100
(3) (1901) I L R 23 All 247
(4) (1886) I L R 8 All 502

# TABLE OF CASES CITED

Registered No. A 422

VOL. XXXII.] [PART II.



# THE INDIAN LAW REPORTS.

FEBRUARY 1910.

(Pages 51—91.)

## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH

REPORTED BY·

Privy Council ... J. V WOODMAN, *Middle Temple*

High Court, Allahabad ... W K PORTER, *Gray's Inn.*



ALLAHABAD

PRINTED BY F LUKER, SUPERINTENDENT, GOVERNMENT PRESS,
AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT,
UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL,

Price, Re. 1.

# INDEX

PAGE.

ACTS—1869—1 (OUDH ESTATES ACT), SECTIONS 8 AND 22, SUB-SECTION (11)—*Succession to estate of taluqdar dying intestate whose name is entered in lists 1 and 5—Impartible estate—" Primogeniture," meaning of* [illegible]

[illegible]

may be given or made by the British Government up to the date fixed for the closing of the list declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture "

*Held* that the meaning of the word [illegible] was the ord[illegible] the death [illegible] contested b[illegible] succession [illegible] governed by the rule of lineal primogeniture, and his uncle, who would succeed if it was regulated by nearness of degree.

*Held* that the question whether the estates of taluqdars for the purposes of intestate succession must be treated as impartible is settled by authority in the affirmative—*Ram Bijai Bahadur Singh* v. *Jagatpal* [illegible]

[illegible] section 8, or whether the succession was to be regulated by the rule of primogeniture as in lists 3 and 5 of section 8.

Section 22, in so far as it describes in the first ten of its sub-sections the specific order of heirs preferred to the succession, must have [illegible] s a statutory substitute [illegible]d Where sub section [illegible] ose of the long list of [illegible] up the rule that in [illegible] ous sub sections there should be preferred "such persons as would have been entitled to

## BOOKS AND PUBLICATIONS FOR SALE

BY THE

## SUPERINTENDENT OF GOVERNMENT PRINTING, INDIA

8 HASTINGS STREET, CALCUTTA

*All books published by the Superintendent of Government Printing, India can be purchased either directly or through the following or any other booksellers —*

AGENTS

CALCUTTA—*Thacker, Spink & Co*
MADRAS—*Higginbotham & Co*
BOMBAY—*Thacker & Co, Ld*; *Radhabai Atmaram Sagoon*

NOTICE.—*Books required for private use only can be purchased Application should be accompanied by a remittance unless it is wished that the books should be sent by value payable post, in which case, besides the ordinary postage, an additional charge will be made for registration and commission*

*Books required for the Public Service should be obtained through Local Governments.*

☞ *The amounts within parentheses are for packing and postage*

# List of Books and Publications for sale which are less than two years old.

## LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No 8 Hastings Street, Calcutta.]

THE PRICES OF THE GENERAL ACTS, LOCAL CODES, MERCHANT SHIPPING, DIGEST INDEX TO ENACTMENTS AND THE DIGESTS OF INDIAN LAW CASES, 1901 TO 1907 (SEPARATELY AND PER SET OF FIVE VOLUMES) HAVE BEEN CONSIDERABLY REDUCED

THE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPARTMENT

### I —THE INDIAN STATUTE BOOK.

REVISED EDITION

*Super royal 8vo, cloth lettered*

B —GENERAL ACTS

General Acts of the Governor General of India in Council, Vol I, from 1834 to 1867, Edition 1909 . Rs 6 (10a)

General Acts of the Governor General in Council, Vol II, from 1868 to 1878 Edition 1909 . Rs 7 (10a)

General Acts of the Governor General in Council, Vol III, from 1879 to 1886 Edition 1909 Rs 6 (9a)

General Acts of the Governor General in Council, Vol IV, from 1889 to 1897, Edition 1909 .. Rs 6 (9a)

General Acts of the Governor General in Council, Vol V, from 1898 to 1903, Edition 1909 .. Rs 6. (9a.)

Volume VI is in the Press.

C —LOCAL CODES

The Bengal Code, Third Edition 1905 containing the Regulations and Local Acts in force in Bengal Vols I to V Rs 6 a volume or

Ac I of 18 ^ (Ev dence) as mod fied up to 1st May 1908 | Re 1 (2 a)
Act IX of 18 (Contract) as modified up to 1st February 1908 | 1 14 a (2 a)
Act I of 18 5 (Op um) as mod fied up to 1st October 190 | 5 a 6 p (1 a)
Act VI of 18 5 (Treasure Trove) as modified by Act XII of 1891 as reprinted on the 14th February 1908 | a 9 p (1 a)
Act VIII of 18 8 (Sea Customs) as mod ed up to 1s June 1908 | Rs 1 5 3 (4 a)
Act XI of 18 8 (Arms) as mod fied up to 1st October 1908 | 6 a (1 a)
Act XVI of 18 9 (Transport of Salt) as mod fied p to 1s October 1907 | 1 a 6 p (1 a)
Act XVIII of 1881 (Central Provinces Land revenue) as mod fied up to 1st March 1909 | Rs 1 2 (3 a)
Act IV of 1884 (Explosives) as modified up to 1st September 1908 | 4 a 9 p (1 a)
Act III of 1888 (Police) as modified up to 1st Janua y 1909 | 1 a 9 p (1 a)
Act II of 18 9 (Measures of Length with footnotes) | 1 a 3 p (1 a)
Act IV of 1889 (Indian Merchandise Marks) as mod fied up to 1st Augus 1908 .. .. | 6 a (1 a)
Act VI of 1889 (Probate and Administration) as mod fied up to 1st January 1909 | 2 a 9 p (1 a)
Act VI of 1890 (Charitable Endowments) as mod fied up to 1st August 1908 | 2 a 6 p (1 a)
Act XI of 1890 (Prevention of Cruelty to An mals) with foot-notes | 2 a (1 a)
Act XIII of 1890 (Excise Malt L quors) as mod fi d up to 1st October 1908 | 1 a 6 p (1 a)
Act VIII of 1899 (Petroleum) as mod fied up to 1st January 1909 | 7 a (1 a)
Act XIII of 1899 (Glanders and Farcy) as mod fied up to 1st February 1908 ... | 2 a 6 p (1 a)
Act X of 1904 (Co operative Cred t Soc eties) with reference to rules under the Act | 5 a 6 p (1 a)

## III —ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED

Acts (Unrepealed) of the Governor General of Ind a in Council from 1907 up to date

[Regulations made under the Statute 33 Vict Cap 3 from 1907 up to date

The above may be obta ned separately The pr ce s noted on each]

## IV —TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL

Act XIII of 1857 (Opium) as mod fied up to 1st August 1908 .. | In U du 9 p (1 a)
Ditto d tto | In Nag 9 p (1 a
Act XXII of 1867 (Sara s and Paraos) as mod fied up to 1st August 1908 | In Urdu 6 p (1 a)
D tto d tto | In Nagr 6 p (1 a)
Act XXV of 1867 (Press and Reg strat on of Books) as modified up to 1st October 1907 | In Urdu 1 a 3 p (1 a
D tto d tto | In Nagr 1 a 3 p (1
Act V of 1870 (Unclaimed Deposits) as mod fied up to 1st October 1908 .. | In Nagr p (1 a)
Act I of 1872 (Ev dence) as mod fied up to 1st May 1908 | In Urdu 8 a (2 a)
Ditto ditto | In Nagr 8 a (2 a)
Act I of 1878 (Opium) as mod fied up to 1st Octobe 1907 | In U d 1 a 6 p (1 a
Ditto d tto | In Nag i 1 a 6 p (1 a
Act XIII of 1889 (Cantonments) as mo i fied up to 1st October 1907 | In Urdu 3 a (1 a 6 p)
Act XII of 1896 (Exc se) as modified p to 1st March 1907 | In Urdu 2 a 9 p (2
D tto d tto | In Nagr 3 a 3 p (2
Act XIII of 18 9 (G anders nd F cy) as mod fied up to 1st February

# INDEX

PAGE.

ACTS—1869—1 (OUDH ESTATES ACT), SECTIONS 8 AND 22, SUB-SECTION (11)—*Succession to estate of taluqdar dying intestate whose name is entered in lists 1 and 5—Impartible estate—"Primogeniture," meaning of in sanad granted by British Government in 1860—Effect of passing of Act No 1 of 1869—Lineal primogeniture and not*

list " of the grantees to whom sanads or grants may have been or

Section 22, in so far as it describes in the first ten of its sub-sections the specific order of heirs preferred to the succession

have

for a

11 of

spec ... prescribed succession, sets up the rule that in default of any one taking under the previous sub sections there should be preferred "such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar, &c, are subject," it must be construed as being a general relegation of parties to the situation in which they would have been found apart from the Act.

In the present case that situation was found in the sanad itself, and was also contained, either by way of affirmance, or at least by way of narrative in list 5 of section 8 of the Act. While the specific rules of succession in Act I of 1869 must be held to displace this, the general reference to what is not covered by those specific rules must include a reference to the rights of parties ascertained in the sanad which was the original title to the property.

Debi Bakhsh Singh v Chandrabhan Singh, I. L. R., 32 All

A D gest of In' an Law Cases, containing the High Court Repo ts and Privy Council Rep rts of Appeals from India 1904, with an Ind x of cases, compil'd under the orders of the Government of India, by C E. Grey, Bar at-Law, Edition 1907, 1 s 5 Reduced to 1 s 1 4 0 per copy .. . (6 )

Ditto ditto 1905, by C E Grey, Bar-at Law, Edition 1907 . 1 s 5 1 duc d to Rs 1-4 0 pe copy (6 a)

Ditto d t'o 1906 by C E. Grey Bar at-Law, Edition 1908 . .. Reduced to Rs 1-4-0 per copy (6 a)

Ditto ditto 1907 by B D Bose, Bar-at- Law, Edition 1908 .. Reduced to Rs 1-4 0 per copy (5 a)

(Set of D gests from 1901—1907 Reduced to Rs 10 per set of 5 volumes)

General Rules and Orders made under enactments in force in British *India consisting of General Rules, Proclamations and Notifications* made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index In three Volumes Rs 15 Reduced to Rs 10 per set (Rs 2) or Rs 5 per Vol (12 a)

*Title page and Contents of the Acts passed by the Governor General of* India in Council in the year 1907 .. . 1 a 6 p (1 a)



Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December, 1903 ... 1a 6p (1a)

Act XX of 1856 (Bengal Chaukidari) as modified up to 1st November, 1903 ... 7a (1a)

Act IV of 1857 (Tobacco, Bombay Town) as modified up to 1st December, 1906 ... 3a [illegible]p (1a)

Act XXIX of 1857 (Land Customs, Bombay) as modified up to 1st December, [illegible] ... 4a (1a)

[illegible] III of 18[illegible] (State Prisoners) as modified up to 1st [illegible], 18[illegible]7 ... 2a (1a)

Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 ... 4a 3p (1a)

Act XXXV of 1858 [Lunacy (District Courts)] as modified up to 30th April, 1903 ... 2a 3p (1a)

Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May 1902 ... 5a (1a)

Act I of 1859 (Merchant Shipping) as modified up to 30th June 1[illegible] ... 13a (2a)

Act XI of 1859 (Bengal Land Revenue Sales), as modified up to 1 August, 1906 ... 4a (1a)

Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874 ... 1a 6p (1a)

Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December, 1904 ... 1a 6p (1a)

Act XXI of 1860 (Societies Registration), as modified up to 1st December 1904 ... 2a 9p (1a)

Act XLV of 1860 (Indian Penal Code), as modified up to 1st April, 1903 with an Index ... Rs 2 8 (5a)

Act V of 1861 (Police), as modified up to 7th March, 1903 ... 7a 6p (1a 6p)

Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898 ... 3a 6p (1a)

Act XXIII of 1863 (Claims to Waste lands) as modified up to 1st December 1896 ... 4a 9p (1a)

Act III of 1864 (Foreigners) as modified up to 1st September, 1906 ... 3a 6p (1a)

Act XVII of 1864 (Official Trustees), as modified up to 1st July 1899 ... 5a 6p (1a)

Act III of 1865 (Carriers), as modified up to 31st May 1903 ... 3a (1a)

Act III of 1867 (Gambling), as modified up to 1st January, 1905 ... 4a (1a)

Act XX of 1869 (Volunteers), as modified up to 1st May, 1896 ... 4a 9p (1a)

Act I of 1871 (Cattle Trespass), as modified up to 1st May 1906 ... 6a (1a)

Act III of 1872 (Special Marriages), as modified up to 1st November 1906 ... 4a 6p (1a)

Act IV of 1872 (Punjab Laws) as modified up to 1st November 1904 ... 7a (1a)

Act XV of 1872 (Christian Marriage), as modified up to 1st December 1904 ... 10a (2a)

Act V of 1873 (Government Savings Bank) as modified up to 1st April 1903 ... 3a 6p (1a)

Act X of 1873 (Oaths) as modified up to 1st February 1903 ... 3a 9p (1a)

Act II of 1874 (Administrator General), as modified up to 1st July, 1890 with a list of Native States included within the Presidencies of Bengal Madras and Bombay respectively for the purposes of the Act ... 11a (2a)

Act IX of 1874 (European Vagrancy), as modified up to 1st December, 1901 ... 6a 6p (1a)

Act XIV of 1874 (Scheduled Districts) as modified up to 1st October, 1895 ... 6a (1a)

Act XV of 1874 (Laws Local Extent) as modified up to 1st October, 1895 ... 7a (1a)

Act IX of 1875 (Indian Majority), as modified up to 1st May, 1906 ... 2a (1a)

Act XI of 1876 (Presidency Banks), as modified up to 1st March, 1907 ... 11a (2a)

Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ... 11a (1a 6p)

Act VII of 1878 (Forests) as modified up to 1st December, 1903 ... 10a (2a)

Act XVII of 1878 (Ferries) as modified up to 1st June 1902 ... 6a (1a 6p)

Act XVII of 1879 (Dekkhan) Agriculturists' Relief), as modified up to 1st June 1905 ... 10a (2a)

Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896 ... 7a 6p (1a)

Act VII of 1880 (Merchant Shipping) as modified up to 15th October, 1891 ... 10a (2a)

Act V of 1881 (Probate and Administration), as modified up to 1st July, 1890 ... 12a (2a)

*Before Sir George Knox Acting Chief Justice, and Mr. Justice Richards*

SHAHZADE SINGH AND ANOTHER (PLAINTIFFS) *v* MUHAMMAD MEHDI ALI KHAN (DEFENDANT) *

*Act (Local) No II of 1901 (Agra Tenancy Act), section 199—Determination by Revenue Court of question of proprietary title—Subsequent suit in Civil Court—Res judicata*

*Held* that the application of the principle that the decision of a question of title by a revenue court under section 199 of the Agra Tenancy Act, 1901 constitutes a *res judicata* in respect of a subsequent suit *in pari materia* brought in a Civil Court is not affected by the fact that the Civil Court suit may be beyond the pecuniary limits of the jurisdiction of the Revenue Court

THIS was an appeal under section 10 of the Letters Patent from a judgment of BANERJI, J

The facts of the case sufficiently appear from the judgment under appeal, which was as follows —

"The suit out of which this appeal arises was brought by the respondents for a declaration that they own plot No 317, which is situated in the village of which the appellant is the landholder The court of first instance dismissed the suit, but the lower appellate court has reversed the decree of that court The defendant has preferred this appeal The only contention raised on his behalf is that the matter in controversy between the parties in the present suit is *res judicata*, in consequence of the decision of the Revenue Court in a suit previously brought by the appellant against the respondents That was a suit for arrears of rent in respect of the very plot of land now in question and was instituted in the court of an Assistant Collector of the second class The defendants to that suit, namely, the present plaintiffs, pleaded that they were not the tenants of the present appellant, but had a proprietary title in the land The Revenue Court itself tried the question of title, and held that the present plaintiffs were tenants of the appellant The decision of the court of first instance in that case was affirmed in appeal by the Collector It is contended that as the question of title raised in the previous case was tried and determined by the Revenue Court, it was a decision within the purview of sub section (3) of section 199 of the Tenancy Act and operates as *res judicata* in the present suit This contention is in my opinion well founded.

* Appeal No. 15 of 1909, under section 10 of the Letters Patent

Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ... ... ... ... ... 0 a 6 p (1 a)

Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 ... ... ... ... .. 1 r 9 p (1 a)

Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... .. ... ... .. 5 a 6 p (1 a)

Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June, 1894 .. ... ... . ... 13 a (2 a)

Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February, 1897 ... ... ... .. ... 5 a 6 p (1 a)

Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899 .. ... .. . 4 a. 9 p (1 a)

Regulation I of 1895 (Kachin Hill Tribes) as modified up to 1st April, 1902 . . ... .. . 6 a (1 a)

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1906

Regulations made under the Statute 33, Vict., Cap 3, from No II of 1875 to 1906 8vo Stitched.

[The above may be obtained separately the price is noted on each ]

## IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

| | | |
|---|---|---|
| Acts X of 1841 and XI of 1850 (Registration of ships) as modified up to 1st December, 1893, with footnotes brought down to 1st December, 1901 | In Urdu. | 2 a. 6 p (1 a) |
| Act XX of 1847 (Copyright), as modified up to 1st May, 1896 . | In Urdu | 1 a. 3 p (1 a) |
| Ditto ditto | In Nagri. | 1 a 3 p (1 a) |
| Act XVIII of 1850 (Judicial Officers' Protection), with footnotes ... | In Urdu. | 6 p (1 a) |
| Ditto ditto . | In Nagri | 6 p (1 a) |
| Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903 | In Urdu. | 6 p (1 a) |
| Ditto ditto . | In Nagri | 6 p (1 a) |
| Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902 | In Urdu | 6 p (1 a) |
| Ditto ditto . | In Nagri | 6 p (1 a) |
| Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904 ... ... | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903 | In Urdu | 6 p (1 a) |
| Ditto ditto | In Nagri | 6 p (1 a) |
| Act XV of 1856 (Hindu Widows' Re-marriage) .. | In Urdu | 6 p (1 a) |
| Ditto ditto | In Nagri | 6 p (1 a) |
| Act XX of 1856, (Police Chaukidars) as modified up to 1st November, 1903 | In Urdu | 2a 6 p (1 a) |
| Ditto ditto . | In Nagri | 2 a 6 p (1 a.) |
| Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 .. .. ... . | In Urdu | 1 a (1 a) |
| Ditto ditto | In Nagri | 1 a (1 a) |
| Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April 1903 .. ... . | In Urdu | 1 a. (1 a) |
| Ditto ditto | In Nagri. | 1 a (1 a) |
| Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May 1902 | In Urdu | 1 a 6 p (1 a) |
| Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874 ... .. .. | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act IX of 1860 [Employers and Workmen (Disputes) as modified up to 1st December, 1904 .. .. . . | In Urdu | 3 p (1 a) |
| Ditto ditto . | In Nagri | 3 p (1 a) |
| Act XLV of 1860 (Penal Code), as modified up to 1st April 1903 .. | In Urdu | 1 r 15 (5 |

# PRIVY COUNCIL.

DEBI BAKHSH SINGH (DEFENDANT) *v.* CHANDRABHAN SINGH, (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow]

*Act No I of 1869 (Oudh Estates Act), sections 8 and 22, sub section (11)—Succession to estate of taluqdar dying intestate whose name is entered in lists 1 and 5—Impartible estate—' Primogeniture," meaning of in sanad granted by British Government in 1860—Effect of passing of Act No I of 1869—Lineal primogeniture and not nearness of degree.*

A sanad granted to a taluqdar in 1860 contained the condition that "in the event of your dying intestate the estate shall descend to the nearest male heir according to the rule of primogeniture" After the passing of the Oudh Estates Act (I of 1869) his name was entered as a "taluqdar" in list 1, and in list 5, which was a list ' of the grantees to whom sanads or grants may have been or may be given or made by the British Government up to the date fixed for the closing of the list, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture "

*Held* that the meaning of the word ' primogeniture" in the sanad was the ordinary meaning of the same word in the Law of England On the death of the taluqdar's widow the succession to his estate was contested by his cousin the respondent, who would be the heir if the succession was governed by the rule of lineal primogeniture, and his uncle, who would succeed if it was regulated by nearness of degree

*Held* that the question whether the estates of taluqdars for the purposes of intestate succession must be treated as impartible is settled by authority in the affirmative—*Ran Bijai Bahadur Singh* v *Jagatpal Singh* (1) and *Jagdish Bahadur* v. *Sheo Partab Singh* (2) The succession therefore to a taluq must be to an impartible estate whether the estate "ordinarily devolved upon a single heir" as in list 2 of section 3, or whether the succession was to be regulated by the rule of primogeniture as in lists 3 and 5 of section 8.

Section 22, in so far as it describes in the first ten of its sub-sections the specific order of heirs preferred to the succession, must have force given to it to the effect of standing as a statutory substitute for any line of succession set forth in the sanad. Where sub-section 11 of section 22, coming as it does at the close of the long list of specific stages of prescribed succession, sets up the rule that in default of any one taking under the previous sub-sections there should be preferred "such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar &c, are subject," it must be construed as being a general relegation

*Present*,—Lord ATKINSON, Lord SHAW, Sir ARTHUR WILSON and Mr. AMEER ALI.

(1) (1890) I. L. R., 18 Calc., 111; L. R., 17 I. A., 173.

(2) (1901) I. L. R., 23 All., 369 L. R., 28 I. A., 100.

| | |
|---|---|
| Act XV of 1881 (Factories), as modified up to 1st April, 1891 ... | In Urdu 1 a 6 p (1 a) |
| Ditto ditto ... | In Nagri 1 a 6 p (1 a) |
| Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898 .. . .. . | In Urdu 9 a (1 a 6 p) |
| Ditto ditto . | In Nagri 9 a (1 a 6 p) |
| Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900 | In Urdu 6 a 9 p (2 a) |
| Ditto ditto . | In Nagri 6 a 9 p (2 a) |
| Act VI of 1882 (Companies), as modified up to 1st August 1906 | In Urdu 13 a 9 p (3 a) |
| Ditto ditto | In Nagri 14 a (3 a) |
| Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 .. .. .. .. | In Urdu 1 a (1 a) |
| Ditto ditto . | In Nagri 1 a (1 a) |
| Act IV of 1884 (Explosives), as modified up to 1st May, 1896 . | In Urdu 1 a 3 p (1 a) |
| Ditto ditto | In Nagri 1 a 3 p (1 a) |
| Act VI of 1884 (Inland Steam Vessels), as modified up to 1st July, 1891 | In Urdu 3 a 6 p (1 a 6 p) |
| Ditto ditto . | In Nagri 3 a 6 p (1 a 6 p) |
| Act XII of 1884 (Agriculturists Loans), as modified up to 1st September, 1906 . .. . | In Urdu. 6 p (1 a) |
| Ditto ditto | In Nagri 6 p (1 a) |
| Act XVIII of 1884 (Punjab Courts), as modified up to 1st December 1899 | In Urdu a 6 p (1 a) |
| Act II of 1885 (Negotiable Instruments Amendment) | In Urdu 9 p (1 a) |
| Act III of 1885 (Transfer of Property Amendment) | In Urdu 3 (1 a) |
| Act X of 1885 (Oudh Estates Amendment) | In Urdu 3 p (1 a) |
| Act XIII of 1885 (Telegraphs) as modified up to 1st March 1905 . | In Urdu 1 a 9 p (1 a) |
| Act XXI of 1885 (Madras Civil Courts Amendment) . | In Urdu 3 p (1 a) |
| Act II of 1886 (Income tax), as modified up to 1st April 1903 | In Urdu 3 a (1 a 9 p) |
| Ditto ditto | In Nagri 3 a (1 a 9 p) |
| Act IV of 1886 (Amending Section 265 of Contract Act) | In Urdu 3 p (1 a) |
| Act VI of 1886 (Births, Deaths and Marriage Registration) | In Urdu 1 a 3 p (1 a) |
| Act X of 1886 (Criminal Law Amendment) | In Urdu 9 p (1 a) |
| Act XI of 1886 (Tramways), as modified up to 31st December, 1900 | In Urdu 3 a 3 p (1 a) |
| Ditto ditto | In Nagri 3 a 3 p (1 a) |
| Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891 | In Urdu 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| Act VI of 1887 (Companies Amendment) | In Urdu 3 p (1 a) |
| Act VII of 1887 (Suits' Valuation) | In Urdu 9 p (1 a) |
| Act IX of 1887 (Provincial Small Cause Courts) as modified up to 1st December, 1896 .. | In Urdu 2 a 3 p (1 a) |
| Ditto ditto | In Nagri 2 a 6 p (1 a) |
| Act X of 1887 (Native Passenger Ships) | In Urdu 1 a 6 p (1 a) |
| Act XII of 1887 (Bengal, North West Provinces and Assam Civil Courts) | In Urdu 1 a 3 p (1 a) |
| Ditto ditto .. | In Nagri 1 a 3 p (1 a) |
| Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899 | In Urdu 3 a 6 p (1 a) |
| Ditto ditto | In Nagri [illegible] a 9 p (1 a) |
| Act XV of 1887 (Burma Military Police) ... | In Urdu 9 p (1 a) |
| Ditto | In Nagri 9 p (1 a) |
| Act XVIII of 1887 (Allahabad University) | In Urdu 1 a (1 a) |
| Act III of 1888 (Police), as modified up to 1st March 1903 | In Urdu [illegible] p (1 a) |
| Ditto (in press) | In Nagri 6 p (1 a) |
| Act IV of 1888 (Indian Reserve Forces), as modified up to 1st M[illegible] 1[illegible] . | In Urdu [illegible] p (1 a) |
| Ditto (in press) . | In Nagri 2 p (1 [illegible]) |
| Act V of 1888 (Inventions and Designs) ... | In Urdu [illegible] |

| | | |
|---|---|---|
| Act XIV of 1895 (Pilgrim Ships) | In Urdu. | 1 a. 3 p (1 a) |
| Act II of 1896 (Cotton-duties) | In Urdu | 1 a 3 p (1 a) |
| Ditto | In Nagri | 1 a (1 a) |
| Act VI of 1896 (Indian Penal Code Amendment) | In Urdu | 3 p (1 a) |
| Act VIII of 1896 (Inland Bonded Warehouses) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act XII of 1896 (Excise), as modified up to 1st August, 1905 | In Nagri | 3 a 3 p (1 a) |
| Act I of 1897 (Act XXXVII of 1850 Amendment) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act II of 1897 (Criminal Tribes Amendment Act) | In Urdu | 3 p (1 a) |
| Act III of 1897 (Epidemic Diseases) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act IV of 1897 (Fisheries) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act VI of 1897 (Negotiable Instruments Act Amendment) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VIII of 1897 (Reformatory Schools) | In Urdu | 1 a 3 p (1 a) |
| Ditto | In Nagri | 6 p (1 a) |
| Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 | In Urdu | 9 p (1 a) |
| Ditto ditto | In Nagri | 9 p (1 a) |
| Act X of 1897 (General Clauses) | In Urdu | 1 a (1 a) |
| Ditto | In Nagri | 1 a (1 a) |
| Act XII of 1897 (Local Authorities Emergency Loans) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act XV of 1897 (Cantonments) | In Urdu | 3 p (1 a) |
| Act I of 1898 [Stage-carriages Act (1861) Amendment] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act III of 1898 (Lepers) | In Urdu | 6 p (1 a) |
| Ditto | In Nagri | 6 p (1 a) |
| Act IV of 1898 (Indian Penal Code Amendment) | In Urdu | 3 p (1 a) |
| Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April 1900 | In Urdu | Re 1 4 (8 a) |
| Ditto ditto | In Nagri | Re 1 6 (8 a) |
| Act VI of 1898 (Post Office) | In Urdu | 3 a 3 p (1 a) |
| Ditto ditto | In Nagri | 3 a 3 p (1 a) |
| Act IX of 1898 (Live stock Importation) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act X of 1898 (Indian Insolvency Rules) | In Urdu | 3 p (1 a) |
| Act I of 1899 [Indian Marine Act (1887) Amendment] | In Urdu | 6 p (1 a) |
| Ditto ditto | In Nagri | 6 p (1 a) |
| Act II of 1899 (Stamps) as modified up to 31st August 1905 | In Urdu | 7 a 6 p (1 a 6 p) |
| Ditto ditto | In Nagri | 7 a 6 p (1 a 6 p.) |
| Act III of 1900 (Prisoners) as modified up to 1st March, 1905 | In Urdu. | 2 a 3 p (1 a) |
| Ditto ditto | In Nagri | 2 a 3 p (1 a) |
| Act IV of 1899 (Government Buildings) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VII of 1899 [Indian Steam vessels Act (1884) Amendment | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VIII of 1899 (Petroleum), as modified up to 1st January 1909 | In Urdu | 1 a 6 p (1 a) |
| Ditto ditto | In Nagri | 1 a 6 p (1 a) |
| Act IX of 1899 (Arbitration) | In Urdu | 9 p (1 a) |
| Ditto ditto | In Nagri | 9 p (1 a) |
| Act XI of 1899 (Court fees Amendment) | In Urdu | 6 p (1 a) |
| Ditto ditto | In Nagri | 6 p (1 a) |
| Act XII of 1899 (Currency Notes Forgery) | In Urdu | [illegible] (1 a) |

# PRIVY COUNCIL.

DEBI BAKHSH SINGH (DEFENDANT) v. CHANDRABHAN SINGH, (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow]

*Act No I of 1869 (Oudh Estates Act), sections 8 and 22, sub section (11)—Succession to estate of taluqdar dying intestate whose name is entered in lists 1 and 5—Impartible estate—"Primogeniture," meaning of in sanad granted by British Government in 1860—Effect of passing of Act No. I of 1869—Lineal primogeniture and not nearness of degree.*

A sanad granted to a taluqdar in 1860 contained the condition that "in the event of your dying intestate the estate shall descend to the nearest male heir according to the rule of primogeniture" After the passing of the Oudh Estates Act (I of 1869) his name was entered as a "taluqdar" in list 1, and in list 5, which was a list ' of the grantees to whom sanads or grants may have been or may be given or made by the British Government up to the date fixed for the closing of the list, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture "

*Held* that the meaning of the word ' primogeniture" in the sanad was the ordinary meaning of the same word in the Law of England On the death of the taluqdar's widow the succession to his estate was contested by his cousin the respondent, who would be the heir if the succession was governed by the rule of lineal primogeniture, and his uncle, who would succeed if it was regulated by nearness of degree.

*Held* that the question whether the estates of taluqdars for the purposes of intestate succession must be treated as impartible is settled by authority in the affirmative—*Ran Bijai Bahadur Singh* v *Jagatpal Singh* (1) and *Jagdish Bahadur* v. *Sheo Partab Singh* (2). The succession therefore to a taluq must be to an impartible estate whether the estate "ordinarily devolved upon a single heir" as in list 2 of section 8, or whether the succession was to be regulated by the rule of primogeniture as in lists 3 and 5 of section 8.

Section 22, in so far as it describes in the first ten of its sub-sections the specific order of heirs preferred to the succession, must have force given to it to the effect of standing as a statutory substitute for any line of succession set forth in the sanad. Where sub-section 11 of section 22, coming as it does at the close of the long list of specific stages of prescribed succession, sets up the rule that in default of any one taking under the previous sub-sections there should be preferred "such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar &c, are subject," it must be construed as being a general relegation

*Present*:—Lord ATKINSON, Lord SHAW, SIR ARTHUR WILSON and Mr. AMEER ALI.

(1) (1890) I. L. R., 18 Calc., 111; L. R., 17 I. A., 173.

(2) (1901) I. L. R., 23 All., 369 L. R., 28 I. A., 100.

| | | | |
|---|---|---|---|
| Act XIII of 1903 (Lepers) | .. | ... | In Urdu 3 p (1 a) |
| Ditto | | | In Nagri 3 p (1 a) |
| Act XIV of 1903 (Indian Foreign Marriages) | ... | .. | In Urdu 3 p (1 a) |
| Ditto | | .. | In Nagri 3 p (1 a) |
| Act XV of 1903 (Punjab Laws) as modified up to 1st December, 1904 | | | In Urdu 1 a 9 p (1 a) |
| Ditto | ditto | .. | In Nagri 1 a 9 p (1 a) |
| Act I of 1904 (Pensions) .. | ... | .. | In Urdu 6 p (1 a) |
| Ditto | | .. | In Nagri 6 p (1 a) |
| Act III of 1904 (Local Authorities Loan) | ... | ... | In Urdu 3 p (1 a) |
| Ditto | | ... | In Nagri 3 p (1 a) |
| Act IV of 1904 (North West Border Military Police) | .. | .. | In Urdu 9 p (1 a) |
| Act of 1904 [Transfer of Property (Amendment)] | ... | .. | In Urdu 3 p (1 a) |
| Ditto | ditto | ... | In Nagri 3 p (1 a) |
| Act VII of 1904 (Ancient Monuments Preservation) | ... | ... | In Urdu 9 p (1 a) |
| Ditto | ditto | .. | In Nagri 9 p (1 a) |
| Act VIII of 1904 (Indian Universities) | ... | ... | In Urdu 1 a. 3 p (1 a) |
| Ditto | ditto | .. | In Nagri 1 a 3 p (1 a) |
| Act X of 1904 (Co-operative Credit Societies) | .. | ... | In Urdu. 1 a (1 a.) |
| Ditto | ditto | .. | In Nagri 1 a (1 a.) |
| Act XI of 1904 (to revive and continue section 8 B of the Indian Tariff Act, 1894) .. .. | ... | ... | In Urdu 3 p (1 a.) |
| Ditto | ditto | ... | In Nagri 3 p (1 a.) |
| Act XIII of 1904 (Indian Articles of War Amendment) | | ... | In Urdu 3 p (1 a) |
| Ditto | ditto | ... | In Nagri 3 p (1 a) |
| Act XV of 1904 [Indian Stamp (Amendment)] | ... | ... | In Urdu 3 p (1 a.) |
| Ditto | ditto | ... | In Nagri 3 p. (1 a.) |
| Act I of 1905 [Local Authorities Loan (Amendment)] | ... | .. | In Urdu 3 p (1 a.) |
| Ditto | ditto | ... | In Nagri 3 p (1 a) |
| Act II of 1905 [Indian Universities ((Validation)] | ... | | In Urdu 3 p (1 a.) |
| Ditto | ditto | ... | In Nagri 3 p (1 a) |
| Act III of 1905 (Indian Paper Currency) .. | ... | ... | In Urdu 9 p (1 a.) |
| Ditto | ditto | ... | In Nagri 9 p (1 a.) |
| Act IV of 1905 (Indian Railway Board) .. | ... | ... | In Urdu 3 p (1 a.) |
| Act VI of 1905 (Court fees Amendment) ... | ... | | In Urdu 3 p (1 a.) |
| Ditto | ditto | .. | In Nagri 3 p (1 a) |
| Act VII of 1905 (Bengal and Assam Laws) .. | .. | .. | In Urdu 3 p (1 a.) |
| Ditto | ditto | | In Nagri 3 p (1 a) |
| Regulation I of 1890 (British Baluchistan Laws) | .. | | In Urdu 2 a. (1 a. 9 p) |
| Regulation V of 1890 (British Baluchistan Forests) | .. | | In Urdu 2 a (1 a 6 p) |
| Regulation VI of 1893 (Hazara Forests) .. | ... | | In Urdu 2 a (1 a 6 p) |
| Regulation VIII of 1896 (British Baluchistan Criminal Justice) | | | In Urdu 9 p (1 a) |
| Regulation IX of 1896 (British Baluchistan Civil Justice) .. | | | In Urdu 2 a 3 p (1 a) |
| Regulation III of 1901 (Frontier Crimes) ... | | | In Urdu 2 a 6 p. (1 a) |
| Regulation IV of 1901 (Frontier Murderous Outrages) ... | | | In Urdu 6 p (1 a) |
| Regulation VII of 1901 (North West Frontier Province) | | .. | In Urdu 4 a 3 p (1 a) |

## V.—MISCELLANEOUS PUBLICATIONS

| | | | |
|---|---|---|---|
| Table showing effect of legislation in the Governor General's Council during 1898 to 1900 | | | Re 1 (1 a 6 p) |
| Ditto | ditto | during 1901 | 6 a (- a) |
| Ditto | ditto | during 1902 | 2 a 6 p (1 a) |
| Ditto | ditto | during 1903 | 14 a (3 a) |
| Ditto | ditto | during 1904 | 4 a (- a) |
| Ditto | ditto | during 1905 | 3 p (1 a) |

A[illegible] to the Acts of the Governor General of India in Coun[illegible] The price is noted on each

Report of Indian Law Commission 1879 Fools

## NOTICE TO SUBSCRIBERS.

In order that an opportunity may be afforded of investigating the cause of the non delivery of any Part or Parts of the "Indian Law Reports, Allahabad Series" to subscribers, it has been found necessary to give notice that no complaint can be attended to regarding the loss of any Part or Parts unless information be forwarded to the Superintendent, Government Press, Allahabad, within three months after the date of publication after that date back numbers can be supplied only on full prepayment and not at the reduced rate of Re 0 5-9 per copy.

The estate of Thangaon was given to Hanuman Bakhsh Singh, a cousin of Raghuraj Singh, and eventually became the property of the latter, who also acquired the other property in suit, and died childless and intestate on 15th January, 1892, all the disputed property then passing into the possession of his widow Rani Brijnath Kunwar She died on 5th August, 1904, and after her death mutation of names was effected by the Revenue Court in favour of the present appellant in respect of all the property in suit, his claim thereto being that he was the nearest reversioner and as such was entitled to it according to the ordinary law of inheritance under the Mitakshara

The respondent thereupon, on 14th November, 1905, instituted the present suit against the appellant, the younger brother of the respondent's father, who had predeceased the widow Brijnath Kunwar The plaintiff claimed to be entitled to succeed in preference to the defendant under the rule of lineal primogeniture, which was, he contended applicable to the taluq of Rajpur under the sanad and the Oudh Estates Act 1869, and to the rest of the property under the family custom above mentioned

The defendant put in a written statement in which he denied that the succession to the property in suit, or any part of it was governed by the rule of lineal primogeniture whether by custom or otherwise Issues were framed of which the 5th only is now material, namely —"Whether the plaintiff is entitled to the property in dispute under the Hindu Law and Act I of 1869 and also under the family and tribal custom as pleaded by the plaintiff"

The courts in India, however, both agreed in holding that the plaintiff was not entitled to any of the property left by Raghuraj Singh other than the taluq of Rajpur This appeal therefore relates to that estate alone

The Subordinate Judge held that the plaintiff was not entitled to any part of the property, and dismissed the suit In doing so, he summed up his findings with regard to the plaintiff's claim under Act I of 1869 as follows —

'*Firstly* that the plaintiff cannot claim the estate under the terms of the sanad granted to Raghuraj Singh because it was superseded by Act I of 1869 and was not revived by the Crown Grants Act, 1895,

# TABLE OF CASES REPORTED.

of parties to the situation in which they would have been found apart from the Act.

In the present case that situation was found in the sanad itself, and was also contained, either by way of affirmance, or at least by way of narrative in list 5 of section 8 of the Act While the specific rules of succession in Act I of 1869 must be held to displace this, the general reference to what is not covered by those specific rules must include a reference to the rights of parties contained in the sanad which was the original title to the property

On these principles and this construction *Held* (affirming the decree of the Court of the Judicial Commissioner) that the succession should be regulated by the rule of lineal primogeniture and not by nearness of degree and that the respondent was entitled to succeed.

APPEAL from a judgement and decree (5th July 1907) of the court of the Judicial Commissioner of Oudh, which partly reversed a decree (13th September 1906) of the Subordinate Judge of tahsil Biswan in the district of Sitapur.

The questions for determination in this appeal were questions of law mainly relating to the proper construction of certain sections of the Oudh Estates Act (I of 1869). A question of fact was in dispute between the parties in the courts in India, namely, the question whether the plaintiff, as he alleged, was entitled to the property in suit by a family and tribal custom of primogeniture, but both courts below concurred in finding as a fact that no such custom had been proved.

The suit out of which the appeal arose was brought by the respondent as heir of his cousin Raghuraj Singh, against the appellant, his uncle, who had on the death of the widow of Raghuraj Singh taken possession of the property in dispute

A pedigree in which the relationship of the parties to the suit is sufficiently shown will be found set out in the judgement of their Lordships of the Judicial Committee.

The property in suit consisted of two estates, named Rajpur Kheoriana and Thangaon, and other property. The Rajpur estate was conferred upon Raghuraj Singh by Government in 18[illegible] under a sanad which contained the following provision:—"It is another condition of this grant that, in the event of your dying intestate, or any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture." And the name of Raghuraj Singh was entered in lists 1 and 5 prepared under section 8 of Act I of 1869

# TABLE OF CASES CITED.

The estate of Thangaon was given to Hanuman Bakhsh Singh, a cousin of Raghuraj Singh, and eventually became the property of the latter, who also acquired the other property in suit, and died childless and intestate on 15th January, 1892, all the disputed property then passing into the possession of his widow Rani Brijnath Kunwar. She died on 5th August, 1904, and after her death mutation of names was effected by the Revenue Court in favour of the present appellant in respect of all the property in suit, his claim thereto being that he was the nearest reversioner and as such was entitled to it according to the ordinary law of inheritance under the Mitakshara.

The respondent thereupon, on 14th November, 1905, instituted the present suit against the appellant, the younger brother of the respondent's father, who had predeceased the widow Brijnath Kunwar. The plaintiff claimed to be entitled to succeed in preference to the defendant under the rule of lineal primogeniture, which was, he contended, applicable to the taluq of Rajpur under the sanad and the Oudh Estates Act, 1869, and to the rest of the property under the family custom above mentioned.

The defendant put in a written statement in which he denied that the succession to the property in suit, or any part of it, was governed by the rule of lineal primogeniture whether by custom or otherwise. Issues were framed, of which the 5th only is now material, namely :—"Whether the plaintiff is entitled to the property in dispute under the Hindu Law and Act I of 1869 and also under the family and tribal custom as pleaded by the plaintiff"

The courts in India, however, both agreed in holding that the plaintiff was not entitled to any of the property left by Raghuraj Singh other than the taluq of Rajpur. This appeal therefore relates to that estate alone.

The Subordinate Judge held that the plaintiff was not entitled to any part of the property, and dismissed the suit In doing so, he summed up his findings with regard to the plaintiff's claim under Act I of 1869 as follows —

' *Firstly*, that the plaintiff cannot claim the estate under the terms of the sanad granted to Raghuraj Singh, because it was superseded by Act I of 1869 and was not revived by the Crown Grants Act, 1895,

# INDEX.

*Secondly*, that, even assuming that the plaintiff's claim under the terms of the sanad is admissible, the language of the sanad fails to show that succession according to lineal primogeniture was intended.

*Thirdly*, that when clause (11) of section 22 is reached, the estate does not descend as an impartible property and that therefore the rule of primogeniture—much less lineal primogeniture—does not apply,

*Fourthly*, that even if it descends as an impartible property, in the present case, succession will not be governed by the rule of lineal primogeniture, and

*Fifthly*, that the succession to the estate shall be regulated by the Hindu Law, and that the estate will devolve upon the nearest male heir, *i. e.*, the defendant, who was alive when the widow Rani Bejnath Kunwar died.

"The result is that the suit fails and is dismissed with costs."

An appeal by the plaintiff was heard by the court of the Judicial Commissioner (MR. E. CHAMIER, Judicial Commissioner, and MR. J. SAUNDERS, officiating 1st additional Judicial Commissioner) and the court delivered judgements the material portions of which were as follows:—

MR. CHAMIER, (after expressing agreement with the court below that the custom set up by the plaintiff had not been proved and that therefore his claim to the property other than the Rajpur taluq had been rightly dismissed) continued:—

"The question whether the plaintiff is entitled to the Rajpur Kechana estate is one of some difficulty and importance."

and after referring to the respective contentions of the parties and the authorities cited in support of them he proceeded:—

"The question is whether the words 'rule of primogeniture' in section 8 of the Act denote the succession of the eldest or first born among several claimants equally entitled under the ordinary law, or the succession of the representative of the senior line, however remote he may be, *i.e.*, lineal primogeniture. It is common ground that the words do not denote the succession of the first-born or eldest collateral regardless of line and degree. It is only by establishing lineal primogeniture as the rule of succession applicable to estates in List 3 that the plaintiff can succeed, for the defendant is older than the plaintiff and is nearer in degree to Raghuraj Singh. * * * * *

"The plaintiff has in my opinion, failed to show that there is any rule of Hindu Law by which impartible estates which are not the property of a joint family descend by the rule of lineal primogeniture. Therefore the plaintiff in order to succeed must show that the word 'primogeniture' in section 8 of the Act denotes lineal primogeniture. It was contended on his behalf that it has been held twice by the Privy Council that the word is used there in this sense.

"The first case referred to was that of *Achal Ram* v. *Udai Partab Addiya Dat Singh* (1). That case related to an estate entered against the name of [illegible]

(1) (1883) I. L. R., 10 Calc., 511; L. R., 11 I. A., 51.

Singh in Lists 1 and 2 which on the death of Pirthipal Singh before 1869 had devolved on his widow and after her death on their daughter On the death of the daughter her husband Achal Ram who had no right whatever had taken possession of the estate The plaintiff was a collateral relative of Pirthipal but not the nearest collateral In order to succeed he had to establish a rule of descent by lineal primogeniture There was no evidence that the estate had ever descended according to such a rule The argument of the plaintiff before their Lordships was that as Pirthipal Singh's name was in List 2 it should be presumed that the heir was to be ascertained by the rule of lineal primogeniture Their Lordships repelled this contention saying that they were of opinion that '*when a taluqdar's name is entered in the second list and not in the third list, the estate although it is to descend to a single heir is not to be considered as an estate passing according to the rules of lineal primogeniture*'

The other case relied on was that of *Bhai Narindar Bahadur Singh* v *Achal Ram* (1), in which Lord Hobhouse said — The estate is in Oudh, and was granted by the Crown to one Pirthipal Singh after the confiscation and it is placed in Class 2 of Act I of 1869, and not in Class 3 The effect of that is that the estate is labelled as one which, according to the custom of the family, descends to a single heir but not necessarily by the rule of lineal primogeniture It may be, and it has so happened in this case that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals or other persons in the line of heirship If so the degree prevails over the line according to the classification under the Act though if two collaterals, or persons in the line of heirship, are equal in degree then as the property can only go to one recourse must be had to the seniority of line to find out which that one is "

"It must be admitted that it was not necessary for their Lordships in either case to decide the question whether an estate in List 3 devolves under clause 11 of section 22 according to the rule of lineal primogeniture but they had to consider incidentally the effect of the entry of an estate in List 3 and the language used by both Sir Barnes Peacock and Lord Hobhouse suggests strongly that they were of opinion that degree prevailed over line in the case of an estate in List 2 but that line prevailed over degree in the case of an estate in List 3

'It must be borne in mind that the application of the rule of primogeniture prescribed by section 8 is limited to cases of succession by ascendants and somewhat remote collaterals of the deceased and it is obvious and also admitted that the words 'rule of primogeniture' do not import the succession of the first born or eldest ascendant or collateral regardless of line and degree It appears therefore, that if primogeniture implies no more than the succession of the first-born of persons standing in the same degree of relationship to the deceased, the rule of succession is the same for estates in Lists 3 and 5 as for estates in List 2 if the personal law is the same and no custom is proved When the Legislature used the words 'rule of primogeniture' they must have intended some known rule of succession the details of which in its application to collateral succession could be ascertained There was no such rule known to the Hindu or Muhammadan Law, apart from special customs the details of which are scarcely ever

(1) (1893) I. L. R., 20 Calc., 649; L. R., 20 I. A., 77.

PAGE.

alike. They were providing a rule of succession which would be applicable to Hindus, Muhammadans and Christians alike, and in the circumstances I do not think it is an extravagant assumption that they had in mind the rule of primogeniture as applied to the succession of real estate in England It has been part of that rule since the time of Edward I, if not that of Henry III, that all the lineal descendants of any person deceased represent their ancestor, i e, stand in the same place as the person himself would have done had he been living. (see Hale on the Common Law, edition of 1794, volume I, chapter II, Pollock and Maitland's History of the English Law, volume 2, page 257, and authorities there cited)

I gather from the language used by their Lordships in the two cases last mentioned that they consider that this rule of representation applied to the succession of estates in List 3 If so the rule applies to estates in List 5 also For these reasons I would hold that the Rajpur Keotana estate devolved upon the plaintiff on the death of Brijnath Kunwar. I would allow the appeal in part and give the plaintiff a decree for possession of that estate with mesne profits from 25th October, 1904, the amount to be determined in execution of decree In other respects I would dismiss the appeal and order the parties to pay and receive proportionate costs in both Courts "

MR SAUNDERS said :—

" I concur with my learned colleague When in clauses (1), (2), (3), (4) (6) and (10) of section 22 of the Oudh Estates Act, the rule of succession by lineal descent is prescribed, it does not appear too far fetched an assumption that the Legislature intended that, on clause (11) of the same section being reached, the person entitled to succeed in the case of estates in Lists 3 and 5 should be ascertained according to the rule of lineal primogeniture "

On this appeal,

*Ross* and *B Dube*, for the appellant, contended that the Court of the Judicial Commissioner had erred in deciding that under clause 11 of section 22 of the Oudh Estates Act (*I of 1869*) succession to the estates of a taluqdar entered in Lists 1 and 5 prepared under section 8 of the Act is governed by the rule of lineal primogeniture If the succession is governed by the rule of primogeniture there was nothing in the terms of the sanad, nor on the construction of section 8 as regarded List 5, to show that " lineal " primogeniture was intended. On the true construction of clause 11 of section 22 of the Act, which, it was submitted governed this case, it was contended that the estate did not descend as impartible property and that therefore the rule of primogeniture did not apply : but that the succession was governed by the " ordinary law to which persons of the religion and tribe of the taluqdar, &c., are subject, " in this case the Hindu law of the Mitakshara school, by which it devolved (at the time of the

deemed to be a decision of such Civil Court, and the present suit being cognizable by a Civil Court of the lowest grade, the decision of the Revenue Court in the former suit operates as *res judicata* Although an appeal did not lie directly from the decision of the Assistant Collector of the second class to the District Judge, an appeal lay to the District Judge from the decision of the Collector in appeal upholding the decision of the Assistant Collector, so that the question of title could, if the defendants to that suit had so chosen, have been raised in and determined by the court of the District Judge In this view the present suit is not maintainable and the appeal must prevail I accordingly allow it with costs, and setting aside the decree of the court below, restore that of the court of first instance dismissing the plaintiffs' suit with costs in all courts"

The plaintiffs appealed

Munshi *Gulzari Lal*, for the appellants, submitted that under the rulings of this Court, the latest of which was in the case of *Lal Singh* v *Khaliq Singh* (1), it was laid down that the judgment of a Revenue Court under section 199, Act II of 1901, on the question of proprietary title had the effect of *res judicata* and section 13 of Act XIV of 1882 would bar a subsequent suit In order to apply the said principle, it had to be seen whether the court which decided the former suit was or was not competent to decide not only the particular issue of title, but also the second suit in which that question had been raised The section was to be applied as a whole An Assistant Collector of the second class had jurisdiction to try suits up to the value of Rs. 100 and therefore he had no jurisdiction to try the present suit which was valued at Rs 250 To hold that the judgment of the Revenue Court in this case barred the present suit, would amount to holding that the decree of a Revenue Court when acting as a Civil Court under section 199 of the Tenancy Act was to be treated as the decree of a Civil Court of the highest jurisdiction This would be against all principles He relied on *Misir Raghobar Dial* v *Sheo Baksh Singh*, (2), *Gokul Mandar* v *Pudmanund Singh* (3) and *Sheikh Hassu* v *Ram Kumar Singh*, (4)

(1) (1909) I. L. R., 31 All., 327
(2) (1883) I. L. R., 9 Calc., 439.
(3) (1902) I L R. 29 Calc 707.
(4) (1894) I L. R., 16 All., 181.

the right to be substituted for the vendee as he stood at the moment of sale, shows that it cannot be allowed to be defeated in this manner. Under Muhammadan Law also a subsequent disposition of the property by the vendee is voidable at the option of the pre-emptor (*vide* Ameer Ali's *Muhammadan Law*). We therefore allow this appeal, set aside the judgment and decree of this Court and reinstate that of the court of first appeal.

1909

KAMTA PRASAD *v.* MOHAN BHAGAT.

Appellants will have their costs in all courts.

*Appeal decreed.*

---

*Before Mr. Justice Richards and Mr Justice Tudball.*

1909 *October* 26.

LALTA PRASAD AND ANOTHER (PLAINTIFFS) *v.* BABU PRASAD AND OTHERS (DEFENDANTS).*

*Act No XV of* 1877 *(Indian Limitation Act), section* 19—*Limitation—Acknowledgment—Authority of managing partner to acknowledge a debt as due by the firm—Receiver.*

*Held* that the manager of a firm who has power to borrow and repay money on behalf of the firm has power also to acknowledge a debt by either immediately giving a promissory note, or subsequently, upon an adjustment of accounts or in any other way in the course of business, making *bonâ fide* admissions in writing.

*Held also* that where in the course of a suit for dissolution of partnership a receiver has been appointed to discharge the debts and liabilities of the firm, the mere fact that a claim which was within time when made is not adjudicated upon by the court until after the expiration of more than three years, does not render the claim a bad claim against the partnership assets.

THE facts of this case were as follows:—

The plaintiffs claimed to be partners to the extent of an eighth share in a rice mill company which was started and managed by Babu Prasad, defendant No. 1 The suit was filed on the 27th June, 1903 A preliminary decree for dissolution was made and a receiver appointed on the 15th March, 1906. The plaintiffs, on the 22nd June following, applied to the receiver for payment to them of a sum of Rs 8,009-14-6, with interest, which they claimed to have advanced as a loan to the company from time to time. Babu Prasad as the managing proprietor of the firm had, on the 2nd February, 1903, given a *sarkhat* to the plaintiffs for Rs. 7,509-14-6, exclusive of interest, and in the written statement filed in another suit on the 8th January, 1904, and in his deposition in the present suit, recorded on the 17th February, 1904,

* First Appeal No. 216 of 1907, from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 3rd of June 1907.

himself by deducting the enhanced revenue from the malikana, but he had omitted to do so in the case of Kachaura, and could not now be allowed to throw the burden of his laches on Agrana It was not the mortgagor who was seeking to redeem the property and any equity that might have been invoked against him, did not, in their Lordships' opinion arise as against the appellants

Appeals 43 and 44 (two appeals consolidated) from judgements and decree (10th April, 1906) of the High Court at Allahabad in second appeals 205 and 293 of 1904 in the former of which second appeals the High Court upheld a decree of the District Judge of Aligarh, and in the latter varied a decree of the same Court

The suit out of which these appeals arose was one for redemption of a mortgage, in which the Courts below differed as to the amount of redemption money payable by the plaintiff and the main question for determination in the present appeals related to the amount so payable under the law and the terms of the mortgage in suit

The facts are fully stated in the report of the hearing of the case in the High Court, which will be found in I. L R, 28 All, 593: they are also given in the judgement of their Lordships of the Judicial Committee

The mortgaged property consisted of two villages, Kachaura and Agrana On 21st December, 1868, one Gardiner mortgaged the whole of Kachaura to Nand Kishore (the predecessor in title of the defendants now represented by the Collector of Aligarh) and one Dwarka Das On January 5th, 1870, Gardner again mortgaged 11 biswas of Kachaura together with 6 biswas of Agrana to Nand Kishore The later mortgage contained a condition that if the Government revenue were enhanced the mortgagor would be liable for the amount of the enhancement It was enhanced, and on failure of the mortgagor to pay, the defendant mortgagee paid it to protect the property from sale The mortgagee obtained a decree on the mortgage of 1868, and under that decree the whole of Kachaura was sold on 20th June, 1878, and was purchased by Nand Kishore himself (the mortgagee) and the widow of Dwarka Das The plaintiffs acquired the *equity of redemption of* $5\frac{1}{4}$ biswas in Agrana, and brought the suit out of which the present appeals arose for redemption on payment of a proportionate amount of the mortgage money.

sum of Rs 8,000 on the ground that they had been misled by the defendants or some one or more of them This sum of Rs 8,000 is not to be confounded with the item of Rs 7 509 14 6 which we shall deal with later on It represented the capital of the plaintiffs in the firm The Court made a decree for the dissolution of the partnership, but it gave no relief to the plaintiffs in respect of the sum of Rs 8,000 to which we have already referred After the primary decree for dissolution had been made the plaintiffs on the 22nd June, 1906, put forward a claim to the Receiver that they were entitled to the sum of Rs 8,077 9 9, with interest, not as partners, but as creditors of the firm The Receiver disallowed this claim on the ground that it was barred by limitation and the Court confirmed the view taken by the Receiver

1909

LALTA PRASAD v. BABU PRASAD.

The question whether or not the plaintiffs are entitled to recover this item out of the assets is the question, and the only question, which has been argued in the present appeal We are satisfied on the evidence that the defendant No 1 Lala Babu Prasad was the managing partner of the firm This matter has not been disputed, and we have been referred to no evidence to the contrary The plaintiffs in a suit which was instituted almost if not quite simultaneously with the present suit, claimed to recover this amount from Lala Babu Prasad personally In his written statement Lala Babu Prasad, whilst he admitted receiving from the plaintiffs another sum of Rs 500 alleged that he had received the amount now in dispute, not in his personal capacity, but as the manager of the firm, and that the money had been duly spent for its purposes Several letters, and in particular the one dated the 5th of August 1906, which have been given in evidence, contain clear admissions that Lala Babu Prasad received the money from the plaintiffs, who are bankers, as manager for the firm No evidence to the contrary was given In our judgment these documents are clear admissions by Lala Babu Prasad that he received the amount. The answering respondents, namely, respondents Nos 18, 20, 23, 26, 28, 30, 38 and 39, allege that Lala Babu Prasad was not an agent within the meaning of section 19, explanation 2, of the Limitation Act of 1877, and further, that assuming that Lala Babu Prasad could give a valid acknowledgment, the claim was barred

Of the issues raised those now material were—

"1. Was the whole of the mortgage debt chargeable on Agrana only? Was the unity of the mortgage split up by the sale of the 20th June, 1878? Is not the plaintiff entitled to redeem only a part of the mortgaged property?

"2 Was any and what sum payable to the defendants on account of enhanced revenue?

"9 What is the entire amount to be paid for the purpose of obtaining redemption?"

The Subordinate Judge recorded that the plaintiffs were willing to redeem the whole 6 biswas of Agrana, and on the 1st issue he found on the facts that the whole debt had to be accounted for as if the village Agrana alone had originally been mortgaged, and that upon it the whole mortgage debt was chargeable With regard to the 2nd issue he decided that the defendants were entitled to the enhanced revenue of Agrana only and not to the enhanced revenue of Kachaura and on 23rd December, 1902, with reference to the 9th issue he decreed that Rs 7,585 12-1 was the amount to be paid by the plaintiffs to the defendants for redemption and that on receipt of that sum the defendants should reconvey the property to the plaintiffs free of encumbrances

Both parties appealed to the District Judge, who, on 2nd January 1904 disposed of the appeals in two separate judgments With regard to the defendants' appeal he held that the plaintiffs were not liable to pay the increased amount of Government revenue assessed and paid by the defendants in respect of the village Kachaura

On the plaintiffs' appeal the District Judge modified the decree of the Subordinate Judge in regard to certain items of account, but on the question whether the plaintiffs could redeem the 6 biswas of Agrana by paying only a proportional part of the debt, he agreed with the Subordinate Judge in holding that, the Kachaura property being no security at all for the mortgage debt, the Agrana property was liable for the whole debt, and could not be redeemed without payment of the whole The result of the two appeals to the District Judge was that the amount decreed by the Subordinate Judge was reduced to Rs 6,870 11-8

will then be distributed amongst the several partners as already directed The appellants will have their costs in this appeal as against respondents Nos 18 20 23 26 28 30, 38 and 39 The objection by the respondents is not pressed It is therefore dismissed, but we make no order as to costs

*Appeal allowed and cause remanded*

1909

LALTA PRASAD
v
BABU PRASAD

---

## REVISIONAL CRIMINAL

1909
*October* 28

---

*Before Mr Justice Tudball*

EMPEROR v RAJ KARAN AND OTHERS *

*Criminal Procedure Code section* 110—*Security for good behaviour—Order for security passed upon failure of charge of a substantive offence against the persons bound over*

Eight persons were sent up for trial on a charge of dacoity and were acquitted and an attempt to prove a case against them under section 400 of the Indian Penal Code was also unsuccessful *Held* that these circumstances were not in themselves a bar to proceedings being shortly afterwards instituted against the person acquitted under section 110 of the Code of Criminal Procedure *Alep Pramanik* v *King Emperor* (1) distinguished

IN this case eight persons were sent up for trial on a charge of dacoity, but, the evidence against them being insufficient, were discharged An attempt was made to obtain evidence against them sufficient for a conviction under section 400 of the Indian Penal Code, but that evidence was not forthcoming Thereupon, as the police information in the case gave the District Magistrate reason to believe that it was necessary to bind over some of these persons to be of good behaviour, he took proceedings against five out of the eight, and after the usual procedure made an order binding them over The Sessions Judge referred the case to the High Court, being of opinion that the action of the Magistrate of the District was illegal in view of the ruling of the High Court at Calcutta in the case of *Alep Pramanik* v *King Emperor* (1)

Mr *W K Porter* (Assistant Government Advocate), for the Crown

No one appeared in support of the reference

---

* Criminal Reference No 581 of 1909

(1) (1906) 11 C W N 418

Each party preferred an appeal to the High Court, which were decided by a divisional Bench of that court (SIR GEORGE KNOX, Acting C J, and AIKMAN, J) The plaintiffs' appeal was numbered 265, and that of the defendant 298 of 1901

On the plaintiffs' appeal the High Court was of opinion that the view taken by the lower courts was right and dismissed the appeal On the defendant's appeal after a remand to the District Judge to inquire " what was the increased amount of Government revenue between the years 1873 and 1878 which the mortgagee paid on behalf of the mortgagor on account of the village Kachaura" the High Court held that the defendants were entitled to the amount of Rs 895 15 9 which they had paid for each of the years from 1873 to 1878 inclusive with 12 per cent interest on each payment To that extent they varied the judgement of the District Judge, and as to the rest of the appeal they dismissed it The High Court judgements are reported at pages 595 to 599 of I L R, 28 All

On these appeals,

*DeGruyther, K C*, and *B Dube* for the appellants contended that the mortgagee was not empowered to pay the enhanced amount of Government revenue in face of a distinct agreement to the contrary embodied in the deed of mortgage, and he was not now entitled to tack the enhanced amount of revenue so paid for Kachaura to the principal debt and to realize the same from the other mortgaged property which the High Court had wrongly held could be done Reference was made to the Transfer of Property Act (IV of 1882), sections 72 and 76, and to the cases upon which the High Court had relied—*Kamaya Naik* v *Devapa Rudra Naik* (1) and *Girdhar Lal* v *Bhola Nath* (2), which, it was contended, were distinguished from the present case, on the ground that here the payment by the mortgagee of the enhanced revenue did not create a lien on the property, though it might be recoverable from the mortgagor in an action for breach of covenant, but the question of there being a personal covenant by the mortgagor to repay such amounts did not arise in the present case as the appellants were not the mortgagors, but merely purchasers The sums paid were payments which the mortgagee was

(1) (1896) I L R., 22 Bom, 440 (2) (1888) I L R 10 All., 611

# APPELLATE CRIMINAL

1909
*October 29.*

*Before Mr Justice Richards*

EMPEROR v SALIM ULLAH KHAN *

*Criminal Procedure Code sections 234 and 537—Act No XLV of 1860 (Indian Penal Code) section 477A—Charge—Misjoinder of charges Illegality*

Where a person who was sent up for trial under section 477A of the Indian Penal Code was charged with having wilfully altered and mutilated certain accounts between the years 1907 and 1909 and the evidence showed that the subject matter of the charge was practically five series of entries in certain sets of books it was *held* that the charge so framed was bad and the defect could not be remedied by section 537 of the Code of Criminal Procedure *Subrahmania Ayyar* v *King Emperor* (1) and *Queen Empress* v *Mati Lal Lahiri* (2) referred to

THIS was an appeal by one Salim ullah Khan from a conviction under section 477A of the Indian Penal Code and a sentence of four years' rigorous imprisonment At the hearing it was submitted by the Assistant Government Advocate (Mr *W K Porter*) for the consideration of the Court that the charge (the material portions of which are set forth in the judgment below) was incorrectly framed, and that, having regard to the ruling of the Privy Council in *Subrahmania Ayyar* v *King Emperor* (1) and of the Calcutta High Court in *Queen Empress* v *Mati Lal Lahiri* (2) section 537 of the Code of Criminal Procedure could not be prayed in aid, but that the conviction and sentence would have to be set aside and a re trial ordered

Mr *G W Dillon*, for the appellant, replied on the preliminary objection

The following judgment was delivered

RICHARDS J—The appellant was charged and convicted under section 477A, Indian Penal Code The charge is in the following terms —"That you, between 1907 and 1909, being a clerk of the Canal Department, wilfully altered and mutilated the accounts which were in your possession &c Section 233 of the Code of Criminal Procedure provides that for every distinct offence of which any person is accused there shall be a separate

---

* Criminal Appeal No 585 of 1909 from an order of L Marshall Sessions Judge of Mainpuri dated the 17th of July 1909

(1) (1901) I L R 25 Mad 61 (2) (1899) I L R 26 Calc 560

bound to make. On the terms of the mortgage deed the mortgagee was not entitled to any interest on the enhanced amount of Government revenue and in any case interest at 12 per cent. per annum should not have been allowed. It was also contended that a portion of the mortgaged property having been purchased by the mortgagee himself the appellants were entitled to redeem the remainder (i.e. Agrana) on payment of a proportionate amount of the mortgage money.

*Ross* and *A. M. Dunne* for the respondent, the Collector of Aligarh, contended that it had been rightly held by the High Court that the appellants were not entitled to redeem the 6 biswas of Agrana on payment of only a proportionate amount of the mortgage money, that under the circumstances of the case the burden of the second mortgage fell entirely upon Agrana; and that the respondents were entitled to get from the appellants the enhanced Government revenue assessed on Kachaura for the years 1873 to 1878 with interest thereon at 12 per cent. per annum. The cases cited by the High Court were in point and should be followed in principle. The mortgagor did not, as he covenanted to do, pay the enhanced revenue, and consequently the mortgagee had himself to pay it to save the mortgaged property from being sold for arrears of revenue, and it should be credited to him in calculating the amount due on redemption.

*DeGruyther, K.C.*, replied, citing *Girdhar Lal* v. *Bhola Nath* (1), where it was said that though the mortgage was executed before the Transfer of Property Act came into force, yet section 72 of that Act was only a reproduction of the old law previous to that Act, and referring to section 90 of the Indian Trusts Act (II of 1882), section 69 of the Contract Act (IX of 1872) and *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (2).

1910 *July 25th*.—The judgement of their Lordships was delivered by MR. AMEER ALI:—

These two appeals, which have been consolidated by an Order of His Majesty in Council, arise out of a suit for redemption brought by the appellants in the Court of the Subordinate Judge of Aligarh in the United Provinces.

(1) (1888) I. L. R., 10 All., 611 (614). (2) (1887) I. L. R., 14 Calc., 809 (815).

# MISCELLANEOUS CIVIL.

1909
*November* 1

*Before Mr Justice Tudball*

KUNWAR KARAN SINGH (PLAINTIFF) *v* GOPAL RAI AND OTHERS (DEFENDANTS) *

*Act No VII of 1870 (Court Fees Act), sections 5 and 12—Court fee—Decision of Taxing Officer final as to category*

The decision of the Taxing Officer as to the proper amount of court fees payable on a memorandum of appeal, as also incidentally his decision as to the category within the suit falls, is final and binding upon the Court under section 5 of the Court Fees Act, 1870.

IN this case, a memorandum of appeal having been presented for report as to sufficiency of stamp, the stamp reporter made the following report —

' The plaintiff appellant Kunwar Karan Singh brought the suit which gave rise to this appeal to recover Rs 4 500 principal and Rs 1,044 interest, total Rs 5 544 from the surplus of the sale proceeds of property mentioned in schedule A, held in deposit in court and by sale of the property mentioned in schedule B attached to the plaint He came into court on the allegation that Syed Haidar Shah the defendant No 1 borrowed from him the sum of Rs 4 500 and in lieu thereof executed a mortgage deed in his favour on the 2nd of September, 1907, by hypothecating the properties mentioned in schedules A and B to secure the repayment of the mortgage money, that it was afterwards discovered that Ram Narayan, the defendant 2nd party, had in execution of a simple money decree attached the property mentioned in schedule A before the execution of the plaintiff's mortgage, that the said property was sold by auction for Rs 14 200 and the sale proceeds were held in deposit in court that the decree held by Ram Narayan defendant was for Rs 7,124 1 0 and it had priority over the plaintiff's claim, that the other creditors who were defendants 3rd party, applied to the Court for rateable distribution of the sale proceeds and that as against the plaintiff who held a lien over the property sold they had no right to have their debts satisfied out of the sale proceeds—hence the suit

' Some of the creditors who are the respondents, opposed the suit on the ground that they in execution of their decrees had attached the property mentioned in schedule A before the execution of the plaintiff's mortgage and that the plaintiff could not therefore claim priority over their debt.

"The case proceeded on its trial and the court below gave the plaintiff a decree for sale as against property mentioned in schedule B and as against the surplus of the sale proceeds of the property mentioned in schedule A it directed that the plaintiff will come in after the decretal debts of Ram Narayan, Gopal Rai Parbhu Lal and Rukman, and Raghubar Dyal and Harbhajan were fully discharged

' The plaintiff being dissatisfied with the decree comes in appeal to this Hon'ble Court and prays that it may be declared that the plaintiff's mortgage has

* Miscellaneous Stamp Reference under section 5 of the Court Fees Act

The property in suit, a 6 biswa share of mauza Agrana, was, with an 11-biswa share of mauza Kachaura, mortgaged in January, 1870, by a Mr William L Gardiner to one Bakhshi Nand Kishore, since deceased, for a sum of Rs 5 000 Under the terms of the mortgage the mortgagee was to have possession of the mortgaged properties, realize the rents and profits and pay therewith the Government revenue which was separately assessed on the two shares Out of the balance he was to retain Rs 600 for the interest on the loan and pay the mortgagor a yearly sum of Rs 2 400 as *malikana* or proprietor's allowance In view of settlement proceedings in progress at the time, the deed further provided that ' if at the recent settlement the Government revenue which is paid at present, is enhanced or decreased to some extent, I [meaning the mortgagor] shall be entitled and liable for it, and the mortgagee shall have nothing to do with it "

As a matter of fact, the revenue respectively assessed on the two properties was enhanced, in the case of Kachaura by Rs. 895, in that of Agrana by Rs 469

On 20th December, 1873, the equity of redemption in Agrana was acquired by the predecessor in title of the appellants, who afterwards sued and obtained a decree for the apportionment of the *malikana* due in respect of the 6 biswa share of Agrana Admittedly, the plaintiffs appellants have since received from Nand Kishore or his representatives the *malikana* for Agrana less the enhanced amount of the Government revenue assessed on it

William Gardiner appears to have executed in 1868 a simple mortgage of Kachaura in favour of Nand Kishore and another, who in 1878 purchased the property in execution of a decree on their mortgage They obtained possession, however, of only an 11-biswa share under a decree of the Court

In the present suit the appellants seek to redeem Agrana upon payment of a proportionate share of the Rs 5,000, their contention being that as Nand Kishore purchased one of the properties on which the mortgage debt was secured, it was *pro tanto* satisfied, and Agrana was only liable for the share legitimately chargeable on it. As Kachaura was sold and purchased

The Taxing Officer on the 12th of August, 1909, made the following order :—

"In the case of *Jhandu Mal* v *Himmat*, (1) the Hon'ble Taxing Judge held that where an appellant sought for a declaration that he need not pay off a prior mortgage before bringing certain property to sale in execution of a decree obtained on his mortgage, he must pay court fees on the sum of which he wished to evade the payment. The present case is to my mind on all fours with this. The lower appellate court has in fact said to the present objector—you may draw the balance of the sum realised by the sale of one of the properties mortgaged to you, provided you first pay the sum of Rs 2,296-5 to certain other persons He seeks to avoid doing this On the reasoning adopted by the Hon'ble Taxing Judge in the case referred to above, he is bound to pay court fees on this amount. I therefore agree with the report of the office and direct *ad valorem* fees to be paid on Rs 2,296-5. This order is passed under section 5 of Act VII of 1870 "

Mr *M L Agarwala* contested this order upon the ground that the decision did not touch the class in which this case fell

Whereupon The Hon'ble Mr Justice GRIFFIN ordered the case to be laid before the Taxing Judge for orders

Mr *W. Wallach*, for the Crown, raised a preliminary objection to the effect that as the Taxing Officer had not thought fit to refer the matter to the Taxing Judge, his decision was final under section 5 of the Court Fees Act, 1870 It was not open to appeal in revision or review. He relied on *Balkaran Rai* v. *Gobind Nath Tiwari* (2) and *Badri Prasad* v *Kundan Lal* (3)

Mr. *M L Agarwala*, for the appellant, submitted that the question whether an *ad valorem* fee should be paid or a fixed fee was one relating to the class or category to which a particular suit belonged Even if there was no difference between the appellant and the Taxing Officer as to the class to which a particular suit belonged, yet there might be a difference as to the amount of court fee payable, and in such cases, the decision of the Taxing Officer, if he does not refer the matter to the Taxing Judge, shall be final But where the question involved the determination of the class to which a particular suit belonged the matter was one not within the province of the Taxing Officer but that of the Judge

He referred to section 12 of the Court Fees Act.

(1) Unreported, but see I L R, 31 All, 271 (2) (1890) I. L. R, 12 All., 129. (3) (1893) I. L. R., 15 All, 117.

by Nand Kishore in execution and part satisfaction of a decree obtained on the prior mortgage of 1868, the courts in India properly overruled the appellant's contention which has not been pressed before this Board.

Agrana, therefore, is now liable for the entirety of the mortgage debt. But the defendant, the Collector of Aligarh, representing the estate of Nand Kishore, among other pleas, urged that the mortgagee had from the date of the enhancement up to the time of his purchase paid the additional revenue assessed on Kachaura for which the mortgagor had made himself liable, and he was consequently entitled to tack on to the mortgage debt the amounts so paid, with interest from 1873 to 1878.

This claim was disallowed by the court of first instance whose judgement was affirmed by the District Court. In second appeal by the defendant the High Court of Allahabad has taken a different view. It has held upon the construction of the clause in the mortgage bond relating to the liability of the mortgagor in case of enhancement of Government revenue that, as the mortgagor did not fulfil his promise to pay the enhancement, and that consequently the mortgagee had himself to pay the enhancement to save the property from being proceeded against for arrears of Government revenue, the defendants were entitled to the amount of Rs. 895-15-9, which they paid from 1873 to 1878 inclusive, with interest. The accounts taken on this basis have swelled the amount payable by the appellants in order to redeem Agrana to over Rs. 30,000.

Their Lordships regret they cannot concur with the learned Judges of the High Court either in the construction of the clause under reference or in the view they have expressed regarding the liability for the payment of the enhanced amount of the assessment on Kachaura. The mortgage bond provided that the mortgagee should, like the mortgagor, remain in possession of the mortgaged properties during the term of the mortgage, and "pay the Government revenue of his own authority." He had thus undertaken the duty of meeting the Government demand. The provision was as much for his own safety as that of the mortgagor. The condition as to mutation of names may be taken to have been duly carried out and his name placed on the Collector's Register

1909

KUNWAR KARAN SINGH v GOPAL RAI

the amount of the court fee payable which is final The Legislature has not thought it fit to allow any appeal from such an order, and it seems to me that once such an order has been passed, I cannot go behind it to examine the method which the Taxing Officer adopted to arrive at his decision I have, therefore, no jurisdiction in this matter to set aside the order of the Taxing Officer Let the papers be laid before the Judge taking applications As Mr *Agarwala* wishes to obtain time to make good the deficiency, I would further point out that in my opinion I have no jurisdiction in the matter, as it has not been referred to me as Taxing Judge by the Taxing Officer

## APPELLATE CIVIL

1909
*November 9*

*Before Sir John Stanley Knight, Chief Justice and Mr Justice Banerji*
SAHIB ALI AND OTHERS (DEFENDANTS) v FATIMA BIBI (PLAINTIFF) *
*Pre emption—Wajib ul arz—Interpretation Perfect partition—No new wajib ul arz framed Malikan deh*

The determination of an alleged right of pre emption must depend upon the particular circumstances of each case and the evidence adduced in support of the pre-emptive right

A village was divided by perfect partition into several mahals but no new wajib ul arz was prepared The wajib ul arz framed before partition was headed *Hakuk hissadaran bakhud!a* rights of co sharers *inter se* and gave the right of pre emption (1) to co sharers in the *khata* (2) to the proprietors of the *patti* and (3) to the proprietors of the village *(malikan deh)* Plaintiff was a co-sharer in a different mahal from that in which the vendor was a co sharer *Held* that the heading of the wajib ul arz limited the meaning of the expression *malikan deh* to proprietors who were co sharers with a vendor between whom and the vendor a common bond subsisted and as the plaintiff was not a co sharer in the same mahal with the vendor she had no right of pre emption

*Janki v Ram Partap Singh* (1) *Sardar Singh v Ijaz Husain Khan* (2) *and Gobind Ram v Masih ullah Khan* (3) distinguished *Dalganjan Singh v Kalka Singh* (4) followed

THE facts of this case were as follows —

In 1888 the village of Arand, which had previously consisted of a single mahal, divided into *thoks* and *pattis*, was partitioned and split up into several mahals The owners of one of these

* First Appeal No 327 of 1907 from a decree of Sayid Tajammul Husain Subordinate Judge of Jaunpur dated the 8th of October 1907

(1) (1905) I L R 28 All 986
(2) (1906) I L R 28 All 614
(3) (1907) I L R 29 All 295
(4) (1899) I L R 22 All 1

as mortgagee in possession The demand for payment of Government revenue would in the ordinary course be made upon him.

The *malikana* had been fixed on the basis of the existing revenue on the two properties, but as settlement proceedings were pending which involved a possibility of a modification in the assessment, the parties provided that in case of reduction the mortgagor should have the benefit, whilst in case of enhancement the liability should be his In other words, if the assessment was lowered, he would receive more by way of *malikana*, whilst if it was enhanced he would be entitled to less

Their Lordships do not understand that the mortgagor by the clause under reference, agreed to pay year by year separately the enhanced amount to meet the Government demand, or that the clause in any way altered the liability of the mortgagee in possession to pay the Government revenue assessed on the mortgaged properties The conduct of the mortgagee in respect of Agrana may be taken as affording some indication of the meaning the parties attached to the clause After the decree for the apportionment of the *malikana* in respect of Agrana, he invariably deducted the additional amount of the assessment from the sum payable to the appellants Instead of taking the same course with regard to Kachaura, he appears to have paid to the mortgagor the whole *malikana* less the share payable for Agrana

In their Lordships' judgement the principle on which the learned Judges of the High Court have based their view of the rights of the parties is not applicable to the circumstances of the present case It was the plain duty of the mortgagee to pay the Government revenue for both properties, in one case he took care to protect himself by deducting the enhanced revenue from the *malikana*, in the other he omitted to do so Whatever the reason, he cannot be allowed now to throw the burden of his own laches on Agrana In the present suit it is not the mortgagor who is seeking to redeem the property; and it seems to their Lordships that any equity that might have been invoked against him does not arise as against the plaintiffs

On the whole *their Lordships are of opinion* that the decree of the High Court, dated the 10th April, 1906, in second appeal 265 of 1901, should be affirmed, and the decree of the High Court

The Court below acceded to this contention, holding that the case was governed by the ruling in *Janki* v *Ram Partap Singh* (1)

As has been often laid down, the determination of an alleged right to pre emption must depend upon the particular circumstances of each case and the evidence adduced in support of the pre-emptive right In the present case the plaintiff relies upon the words in the wajib ul-arz "*malikan deh*" as strongly supporting her claim We have therefore to ascertain what meaning is to be attributed to this expression in the wajib ul arz in question I think that the key to its meaning is to be found in the language used in the heading to Chapter II, in which chapter is to be found the provision as to pre emption The heading of this chapter is "Rights of co sharers, ('*hissadaran deh*'), as among themselves based on custom or agreement" The words "co-sharers as among themselves" seem to limit the meaning of the words *malikan deh* to proprietors who are co-sharers with a vendor between whom *and the vendor is a common bond* The plaintiff in this case is not such a co sharer, and therefore I think, cannot claim the benefit of the custom The case is unlike that which was relied on by the Court below Its facts also do not resemble those in the case of *Sardar Singh* v *Ijaz Husain Khan* (2), in which upon partition a new wajib ul arz was prepared which was a verbatim copy of the old wajib ul arz I would therefore allow the appeal and dismiss the plaintiff's suit The view which I take does not conflict with that expressed in *Gobind Ram* v *Masih ul-lah Khan* (3) inasmuch as in that case there was no long in the wajib ul arz relied upon to qualify the meaning of the expression *hissadaran deh* as used in it

BANERJI, J —I am of the same opinion The plaintiff claims under a custom recorded in the wajib ul arz prepared in 1883 1884, when the village was an undivided village and consisted of only one mahal Chapter II of the wajib ul arz, containing the clause relating to pre emption, is headed "*Hakuk hissadaran bakhudha* (rights of co sharers *inter se*)" It is clear from this heading that the persons referred to in the clause were persons among whom existed the common bond of being co-sharers

(1) (1905) I L. R., 28 All., 286 (2) (1906) I. L R 28 All. 614
(3) (1907) I. L. R. 29 All., 295

by Nand Kishore in execution and part satisfaction of a decree obtained on the prior mortgage of 1868, the courts in India properly overruled the appellant's contention which has not been pressed before this Board

Agrana, therefore, is now liable for the entirety of the mortgage debt But the defendant, the Collector of Aligarh, representing the estate of Nand Kishore, among other pleas, urged that the mortgagee had from the date of the enhancement up to the time of his purchase paid the additional revenue assessed on Kachaura for which the mortgagor had made himself liable, and he was consequently entitled to tack on to the mortgage debt the amounts so paid, with interest from 1873 to 1878

This claim was disallowed by the court of first instance whose judgement was affirmed by the District Court In second appeal by the defendant the High Court of Allahabad has taken a different view It has held upon the construction of the clause in the mortgage bond relating to the liability of the mortgagor in case of enhancement of Government revenue that, as the mortgagor did not fulfil his promise to pay the enhancement, and that consequently the mortgagee had himself to pay the enhancement to save the property from being proceeded against for arrears of Government revenue, the defendants were entitled to the amount of Rs 895 15 9, which they paid from 1873 to 1878 inclusive, with interest The accounts taken on this basis have swelled the amount payable by the appellants in order to redeem Agrana to over Rs 30,000

Their Lordships regret they cannot concur with the learned Judges of the High Court either in the construction of the clause under reference or in the view they have expressed regarding the liability for the payment of the enhanced amount of the assessment on Kachaura The mortgage bond provided that the mortgagee should like the mortgagor, remain in possession of the mortgaged properties during the term of the mortgage, and " pay the Government revenue of his own authority." He had thus undertaken the duty of meeting the Government demand The provision was as much for his own safety as that of the mortgagor. The condition as to mutation of names may be taken to have been duly carried out and his name placed on the Collector's Register

*Before Mr Justice Banerji and Mr Justice Tudball.* 1909 *July 27.*

BENI MADHO AND ANOTHER (DEFENDANTS) *v* INDAR SAHAI (PLAINTIFF) AND OTHERS (DEFENDANTS) *

*Civil Procedure Code* (1908), *section* 11—*Res judicata* "*Former suit*"—*Application of rule of res judicata unaffected by the question in which court an appeal lies*

The rule of *res judicata* so far as it relates to the retrial of an issue refers not to the date of the commencement of the litigation but to the date when the Court is called upon to decide the issue *Balkishan* v *Kishan Lal* (1) followed

*Held also* that it is the competency of the Court of first instance to entertain the two suits which regulates the application of the rule of *res judicata* the fact that in the two suits appeals may lie in different Courts does not affect the application of the rule.

THE facts of this case were as follows :—

On the 15th of November, 1899, a lease was granted by Indar Sahai, plaintiff, who is the zamindar of the village, to Ajudhia Prasad and Mathura Prasad, the predecessors in title of the appellants The lessees, alleging that they had been dispossessed, brought a suit for recovery of possession and compensation, and obtained a decree on the 25th of March, 1903 They obtained formal possession on the 4th of September, 1903, but were again dispossessed, and thereupon they brought another suit on the 4th of March, 1904, for recovery of possession and compensation This suit was decreed by the Court of first instance on the 30th of September, 1904, and the decree was affirmed in appeal Possession was delivered on the 19th of November, 1905 On the 4th of December, 1905, the lessor brought the suit which has given rise to this appeal, against the lessees for arrears of rent for the period from the 5th of March, 1904, to the 19th of November, 1905 On the 3rd of January, 1906, the lessees brought another suit for compensation for the same period, that is, for the period subsequent to the date of the institution of the suit brought by them on the 4th of March, 1904, to the date of delivery of possession, namely, the 19th of November, 1905 This suit was decreed by the Court of first instance, on the 5th of June, 1906 Indar Sahai appealed against this decree to the Commissioner, but his appeal was finally dismissed. The Court of first instance

* Second Appeal No 1101 of 1908 from a decree of C D Steel District Judge of Shahjahanpur dated the 29th of July 1908 reversing a decree of Jagmohan Nath Assistant Collector, first class of Shahjahanpur dated the 5th of June 1906

(1) (1888) I L R, 11 All, 148.

comply with the decree, and the appellant then made certain constructions, ostensibly in compliance with the decree, and was allowed Rs 37 8 0 costs from the Board There was however, a dispute as to whether the plaintiff had not exceeded the powers given to him by the decree, and the Court ordered that a portion of the constructions should be dismantled, and against this order the Board did not appeal Meanwhile the Municipality prosecuted the applicant on the ground that the erections were made without the permission of the Board A bench of Magistrates convicted the petitioner under section 147 of Act I of 1900 and the conviction was upheld by the District Magistrate The petitioner then appl ed in revi ion to the Sessions Judge, who referred the ca e to the High Court with a recommendation that the conviction should be set aside on the ground that the Municipal Board could not convict the petitioner for having made constructions under the decree of a Civil Court

*The Assistant Government Advocate* (Mr *R Malcomson*) in support of the conviction

KARAMAT HUSAIN and CHAMIER J J —This is a reference by the Se sions Judge of Mainpuri in which he recommends that the conviction of Baldeo Prasad under section 147 of the United Provinces Municipalities Act should be set aside The facts, which are somewhat peculiar, are as follows —In a civil suit between Baldeo Prasad as plaintiff and the Municipal Board of E awah as defendant, it was decided by the District Judge on appeal that Baldeo Prasad was not entitled to close a certain drain in front of his house, but that he might have the platform in front of his house connected with the public road by means of a stair case The decree directed the Municipal Board to erect the stair case within two months, in default Baldeo Prasad was entitled to erect it himself and recover the cost of doing so from the Municipal Board The Municipal Board took action, which they said complied with the decree But Baldeo Prasad contended that the Board had not complied with the decree and he proceeded to enlarge the stair case which the Board had built and to cover a large part of the drain along the front of the house and also to erect what has been described as a vertical buttre s in front of his house projecting a foot or more from the

instance on the 5th of June 1906 Indar Sahai appealed against this decree to the Commissioner, but his appeal was finally dismissed The Court of first instance dismissed the suit for arrears of rent brought by the lessor, holding that during the period for which rent was claimed the lessees were out of possession This finding was in accordance with the result of the litigation which ended in the decree of the 30th of September, 1904 From the decree passed in the suit brought by the lessor an appeal was preferred to the District Judge The appeal prevailed and the suit of the plaintiff lessor was decreed Upon second appeal to this Court the decision of the lower appellate Court was set aside and the case was remanded to that Court After remand the learned Judge adhered to his original decision and decreed the claim of the lessor From this decree the present appeal has been preferred

It is contended that as before the decision of the appeal to the lower appellate Court in this case the decree in the suit brought by the lessees had become final the matter in issue in this case has become *res judicata* in consequence of that decree This contention is in our judgment well founded The learned Judge overruled the plea of *res judicata* on the ground that the present suit had been instituted before the institution of the suit of the lessees in which they obtained a decree from the Court of first instance on the 5th of June, 1906, and that therefore the finding in that suit cannot be deemed to be a finding in a former suit and the rule of *res judicata* does not apply

With this view we are unable to agree It was held by a Full Bench of this Court in *Balkishan* v *Kishan Lal* (1) that the rule of *res judicata*, so far as it relates to the retrial of an issue,' refers not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue " The Legislature has given effect to this ruling by adding to section 11 of Act No V of 1908 explanation I—which is as follows —" The expression ' former suit ' shall denote a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto " The date of the institution of a suit is therefore immaterial for the operation of the rule of *res judicata* Mr *Govind Prasad*, who appears on behalf of the

(1) (1888) I. L. R 11 All., 148

original front of the building Having done this he applied to the Civil Court for the cost incurred by him An amin was sent to the spot and reported that the constructions were in some respects in accordance with and in other respects contrary to the decree of the Civil Court The District Magistrate says that the amin's report is flagrantly contrary to facts, but, however that may be, the report was laid before the Subordinate Judge and he decided that some of the constructions should be removed and that the rest might stand The Municipal Board have not appealed against this decision But while these proceedings were going on the Municipal Board by a resolution required Baldeo Prasad to dismantle the buttress and certain portions of the stair case erected by him The resolution is not on the record nor is the Board's subsequent order to Baldeo Prasad requiring him to dismantle the buttress and portions of the staircase But we may assume for the purpose of this case that the proceedings of the Board were so far in order The question is whether it is open to the Municipal Board to prosecute Baldeo Prasad in respect of the buttress and the stair case pending the decision of the dispute by the Civil Court and to continue the prosecution after the Civil Court decided the matter in favour of Baldeo Prasad It seems to us that inasmuch as the Board were parties to the execution proceedings they should have appealed against the Subordinate Judge's order if they considered that it was erroneous It seems clear that the provisions of the Municipal Act were not intended to enable Municipal authorities to override the decision of a competent Civil Court in a matter of this kind by means of a criminal prosecution We set aside the conviction of Baldeo Prasad and direct that fine if paid, be refunded

*Conviction set aside.*

# MISCELLANEOUS CIVIL.

1909
October 30

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

IN THE MATTER OF THE PETITION OF NAND KISHORE.*

*Civil Procedure Code* (1908), *sections* 11, 151; *order* 47, *rule* 1—*Review of judgment—Application for review in second appeal based on alleged discovery of new and important evidence*

The High Court cannot in a second appeal entertain an application for a review of judgment based on the ground that since the disposal of the appeal, documentary evidence has been discovered which, *if sufficiently proved*, would have led the Court below to come to a different finding, although, had such evidence been discovered before the disposal of the appeal, the Court might have allowed the appellant to withdraw the appeal with a view to apply to the lower appellate court for a review of judgment on the ground of the discovery of fresh evidence. *Panchanan Mookerjee* v. *Radhanath Mookerjee* (1) and *Raru Kutti* v. *Mamad* (2) referred to and followed.

THIS was an application for review of judgment on the ground of the discovery of fresh evidence. The High Court on the findings of fact in Second Appeal No 881 of 1905 dismissed the appeal on December 12th, 1907 In 1909 the appellant applied for review of the judgment on the ground that he had discovered new and important evidence, which, if produced before the Court at the trial, might have affected its decision.

Maulvi *Abdul Majid* (with him Babu *M L Sandal*), for the opposite party, raised a preliminary objection that the Court having decided questions of fact in the appeal could not entertain an application for review of judgment of a second appeal on the ground that the decision was not correct He referred to *Bandhan Singh* v. *Chet Narain Singh* (3) and *Raru Kutti* v. *Mamad*, (2)

Mr. *W. K Porter* for the applicant, submitted that so far as the finding of fact went the Court might not look at the evidence on the record. He only wanted the Court to look at the new evidence, and if that was *primâ facie* sufficient to support the applicant's allegation to remand the case. Counsel referred to *Habib Bakhsh* v. *Baldeo* (4). It was there decided that the Court had power to remand where the justice of the case required it. That power is now given by section 151 of the new Code of Civil

* Application for review of judgement in Second Appeal No 881 of 1905.

(1) (1870) 4 B L R, 213, A C
(2) (1895) I L R, 18 Mad, 480
(3) (Weekly Notes, 1895, p 131.
(4) (1901) I L R, 23 All 167.

deemed to be a decision of such Civil Court, and the present suit being cognizable by a Civil Court of the lowest grade, the decision of the Revenue Court in the former suit operates as *res judicata* Although an appeal did not lie directly from the decision of the Assistant Collector of the second class to the District Judge, an appeal lay to the District Judge from the decision of the Collector in appeal upholding the decision of the Assistant Collector, so that the question of title could, if the defendants to that suit had so chosen, have been raised in and determined by the court of the District Judge In this view the present suit is not maintainable and the appeal must prevail I accordingly allow it with costs, and setting aside the decree of the court below, restore that of the court of first instance dismissing the plaintiffs' suit with costs in all courts"

The plaintiffs appealed

Munshi *Gulzari Lal*, for the appellants, submitted that under the rulings of this Court the latest of which was in the case of *Lal Singh* v *Khaliq Singh* (1), it was laid down that the judgment of a Revenue Court under section 199, Act II of 1901, on the question of proprietary title had the effect of *res judicata* and section 13 of Act XIV of 1882 would bar a subsequent suit In order to apply the said principle, it had to be seen whether the court which decided the former suit was or was not competent to decide not only the particular issue of title, but also the second suit in which that question had been raised The section was *to be* applied as a whole An Assistant Collector of the second class had jurisdiction to try suits up to the value of Rs 100 and therefore he had no jurisdiction to try the present suit which was valued at Rs 250 To hold that the *judgment* of the Revenue Court in this case barred the present suit, would amount to holding that the decree of a Revenue Court when acting as a Civil Court under section 199 of the Tenancy Act was to be treated as the decree of a Civil Court of the highest jurisdiction This would be against all *principles* He relied on *Misir Raghobar Dial* v *Sheo Baksh Singh* (2), *Gokul Mandar* v *Pudmanund Singh* (3) and *Sheikh Hassu* v *Ram Kumar Singh*, (4)

(1) (1909) I. L. R., 31 All., 323
(2) (1883) I. L. R., 9 Calc., 439
(3) (1902) I. L. R. 29 Calc 707.
(4) (1894) I. L. R., 16 All., 183.

Madras High Courts. In the case of *Panchanan Mookerjee* v. *Radha Nath Mookerjee* (1) it was held by Mr. Justice LOCH and Mr Justice MITTER on application for review of a judgment passed by the High Court in a special appeal confirming the decision of the lower appellate Court on the ground of discovery of new evidence, that though this might be a ground for moving the lower appellate Court for a review of its judgment, it was not a sufficient ground for asking for a review of a judgment passed in special appeal. In the case of *Raru Kutti* v. *Mamad* (2) COLLINS, C J, and PARKER, J., decided a similar point. The plaintiff, who was appellant in second appeal, sought a review of judgment on the ground of the discovery of new and important evidence, from which it would, it was said, appear that the properties in dispute in the litigation were not under attachment at the date of the mortgage the subject matter of the suit. It was held that the application for review could not be entertained for the reason that the ground relied upon could not be successfully relied upon in second appeal Their Lordships say:— "In this case the second appeal has been heard and decided, and we can no longer permit the appeal to be withdrawn, nor could we in second appeal admit evidence of fact which was not before the lower appellate Court We think that the application for a review of judgment on the ground of the discovery of new and important evidence necessarily fails.

1909

IN THE MATTER OF THE PETITION OF NAND KISHORE

But a further point, which we may call trivial, has been raised by the learned advocate for the applicant In the judgment of this Court referring to the receipt, which is now alleged to be a spurious receipt, the Court observes:—"On the 25th of December, 1902, a sum of Rs 1,520 was paid in advance for rent by the lessee to the lessor on demand made by the lessor in pursuance of the provisions in the lease to which we have referred This payment, it is found satisfied the rent payable up to the end of 1314 F" An objection is raised to the statement that 'this payment satisfied the rent payable up to the end of 1314 F." The Court did not arrive at any finding of fact as to this nor did it intend to do so But interpreting the judgment of the learned District Judge, the statement

(1) (1870) 4 B. L. R, 213, A. C. (2) (1895) I L. R, 18 Mad, 480.

from him had a like power It is said that this view is in conflict with a ruling of this Court in *Harnandan Rai* v *Nakchedi* 1 *Rai* (1) The facts of that case are not similar to those now before us In that case a simple money bond was executed before the passing of the Agra Tenancy Act in which there was a provision that in default of payment of the debt the simple bond should be converted into a usufructuary mortgage Default was made in payment but not till the 22nd of June, 1902, when the Agra Tenancy Act was in force, and it was held that the agreement of the parties to create a usufructuary mortgage could no be carried out in view of the provisions of section 20 of that Act It is obvious that this case was governed by different considerations from those which present themselves in the present appeal

We think that the lower appellate court was right and dismiss the appeal with costs

*Appeal dismissed*

---

*Before Sir John Stanley Knight Chief Justice and Mr Justice Griffin*

MUHAMMAD ALAM AND ANOTHER (DEFENDANTS) *v* AKBAR HUSAIN AND OTHERS (PLAINTIFFS) *

*Act No 1 of 1877 (Specific Relief Act) section 42—Muhammadan law—Waqf—Right of Muhammadans entitled to use such property to sue for a declaration that property is waqf*

The plaintiffs Muhammadans resident in the city of Kanauj sued for a declaration that a certain *idgah* and the land adjoining it situated in a village in pargana Kanauj was waqf property *Held* that as Muhammadans who had a right to use the *idgah* they were entitled to sue and that no special permission was required to enable them to do so *Zafaryab Ali* v *Bakhtawar Singh* (2) and *Jawahra* v *Akbar Husain* (3) followed *Wajid Ali Shah* v *Dianat-ullah Beg* (4) distinguished

The facts of this case were as follows —

Certain Muhammadans seven in number, residents of the city of Kanauj brought a suit for a declaration that a certain idgah and land adjoining it situate at Kandrauli, a village in

---

* Second Appeal No. 987 of 1906 from a decree of Muhammad Ishaq Khan District Judge of Farrukhabad dated the 8th of June 1909 modifying a decree of Daya Nath Subordinate Judge of Fatehgarh, dated the 27th of September 1907

(1) Weekly Notes 1906 p 80 (2) (1883) I. L. R 5 All., 497 (3) (1884) I. L. R., 7 All., 178. (4) (1885) I. L. R., 8 All., 31

1909

EMPEROR v. GHANSHAM SINGH

Hashim, charging him with cheating After that Muhammad Hashim also brought a complaint against Mare Lal for forging a sale-deed purporting to have been executed by his wife in favour of Mare Lal The sale deed was produced at the enquiry of both these cases Hashim's complaint was dismissed But in Mare Lal's complaint Hashim was sentenced to seven years' rigorous imprisonment by the Additional Sessions Judge of Meerut At the inquiry before the Deputy Magistrate and also at the trial before the Additional Sessions Judge it was suggested that Muhammad Hashim was only a tool in the hands of Ghansham Singh, an enemy of Mare Lal Mare Lal thereupon instituted a complaint against Chaudhri Ghansham Singh for abetment of an offence of forgery for which Hashim had been convicted and also for abetment of a false complaint brought against him by Hashim The District Magistrate transferred the case to a Deputy Magistrate for trial Ghansham Singh objected as to the legality of the proceedings on the ground that the offence could not be taken cognizance of without previous sanction of the Additional Sessions Judge before whom the principal offender had been tried and convicted The Deputy Magistrate postponed the case and gave Ghansham Singh opportunity to apply to the Sessions Judge, who rejected his application, holding that the case could be proceeded against him without any sanction Ghansham Singh therefore applied to the High Court in revision.

Mr *C C Dillon* (with him Babu *Satya Chandra Mukerji* and Babu *Surendra Nath Sen*), for the applicant contended with reference to section 195 of the Criminal Procedure Code, 1898, that the objects of the Legislature in enacting that section were two fold (1) to afford protection of the Court to certain class of persons in respect of certain offences (2) to prevent baseless prosecutions from being started There was a distinction between sections 195 and 476, and it was submitted that under section 476 of the Code the Court could itself punish offenders for contempt of Court, and under 195 it could delegate its authority to a private person The circumstances under which the Court could exercise its authority under section 476, were similar to those under which sanction might be granted under section 195. In order that

pargana Kanauj, were waqf property. The defendant was a purchaser of a portion of the property. The suit was resisted by him on the ground that the property was not waqf property. The court of first instance declared that the idgah was endowed property, but dismissed the suit as to the lands adjoining. The lower appellate court came to the conclusion that both the idgah and the lands adjoining were endowed property and decreed the suit in full. The defendant appealed.

Maulvi *Muhammad Ishaq*, for the appellant:—

Plaintiffs' suit came under the provisions of section 42 of the Specific Relief Act. The property having been found to be waqf property and no permission having been obtained from the Legal Remembrancer a suit of this nature was not maintainable under sections 92 and 93 of Act V of 1908. He cited *Wajid Ali Shah* v. *Dianat-ullah Beg* (1).

Babu *Balram Chandra Mukerji* (for Maulvi *Ghulam Mujtaba*), for the respondents:—

Any Muhammadan who has a right as such to use a mosque has a right to have it declared that the property appertaining to the mosque is waqf property. It is not necessary for him to show that he had any special interest in it. He had a right to prevent anyone from claiming property in the mosque and the adjoining lands. He relied on *Zafaryab Ali* v. *Bakhtawar Singh* (2), *Jawahra* v. *Akbar Husain* (3), *Raghubar Dial* v. *Kesho Ramanuj Das* (4) and Ameer Ali's *Mohammedan Law*, Vol. I, p. 439. (3rd edition).

STANLEY, C. J. and GRIFFIN J.:—The plaintiffs, who are seven in number and all residents of the city of Kanauj, instituted the suit out of which this appeal has arisen to have it declared that certain land in the village of Kandrauli in the pargana of Kanauj is waqf property appertaining as such to an *idgah* or mosque which was built by the Moghal Emperors. It appears from the judgment of the lower appellate court that the land in question was recorded as *bagh idgah* at mauza Kandrauli, No. 463, at the time of the settlement made under Regulation IX of 1833, and No. 189 in the jamabandi of the settlement of 1872. The principal defendants are the purchasers of a part of

(1) (1885) I. L. R., 8 All., 31.
(2) (1883) I. L. R., 5 All., 497.
(3) (1884) I. L. R., 7 All., 178.
(4) (1888) I. L. R., 11 All., 18.

One Muhammad Hashim has been convicted of the offence of forging a sale-deed and sentenced to seven years' rigorous imprisonment. The principal witness against Muhammad Hashim and the complainant in the case was one Mare Lal. The same Mare Lal has now instituted a complaint against Ghansham Singh for abetment of the forgery of which Muhammad Hashim was convicted. Ghansham Singh took an early opportunity after he appeared in Court of objecting to the jurisdiction of the Court which was holding the inquiry and said that the Magistrate could not take cognizance of the complaint without the sanction of the Additional Sessions Judge in whose Court Muhammad Hashim was tried and in whose Court at that trial the forged sale deed was produced. It is admitted on both sides that neither Muhammad Hashim nor Ghansham Singh were parties to any proceeding in any Court in respect of the sale deed. That being so, there was no need of sanction to be given by the Additional Sessions Judge. The offence or offences in which section 195, clause (1), sub clause (c), read with clause (3), requires that sanction should be given by a Court with respect to documents produced in court must be offences committed by parties to the proceeding, whether the offence be one of the substantive offences described in section 463 or punishable under sections 471, 475 or 476 of the Indian Penal Code or only amounts to abetment of any such offences. We are satisfied that this is the right construction to put upon the words used in section 195, clauses (1) (c) and (3). The view taken by the learned Additional Sessions Judge on this point was a correct view. We see no cause to interfere and direct that the record be returned.

the zamindari of the village Kandrauli The defendants set up a plea that neither the *idgah* nor the land adjoining it was waqf property, and upon this plea the main issue in the case was framed The court of first instance gave the plaintiffs a declaration that the *idgah* was endowed property, but dismissed the suit as regards the land adjoining it Upon appeal the learned District Judge came to the conclusion upon the evidence that the land adjoining the *idgah* was endowed property, and he decreed the plaintiffs' claim in full From this decision the appeal which is now before us has been preferred, and the main contention of the learned vakil for the appellants is that the plaintiffs respondents have no right to maintain the suit It is contended that apart from the provisions of section 42 of the Specific Relief Act and section 539 of the old Code of Civil Procedure, corresponding to sections 92 and 93 of Act V of 1908, a suit of the nature of the present suit cannot be maintained and that the plaintiffs who are Muhammadan residents of Kanauj, could not show that they had any special interest in the mosque in question and had no right to bring the suit Reliance in support of this contention is based upon the ruling in *Wajid Ali Shah* v *Dianat ullah Beg* (1) In that case a Muhammadan not a resident of the district in which the alleged waqf property was situate, brought a suit against a person in possession of that property for a declaration that the property was waqf and in his plaint he did not allege that he himself was interested in the property further or otherwise than as being a Muhammadan It was held by PETHERAM, C J, and OLDFIELD, J, that unless it could be shown that the suit was maintainable under some statutory provision, it could not be maintained, that inasmuch as no permission had been given to the plaintiff to bring the suit, it was not maintainable under Act XX of 1863 or under section 539 of the Civil Procedure Code and that the suit was not maintainable under the provisions of section 42 of Act I of 1877 (the Specific Relief Act) The learned Judges in their judgement observed as regards section 42 of the Specific Relief Act that the only right asserted by the plaintiff was his right as a Muhammadan to have the property kept as waqf for the general body of

(1) (1885) I L R, 8 All, 31.

complaint by a person aggrieved of an offence under section 494 of the Indian Penal Code It is quite clear that no charge of bigamy has been preferred by either the husband of Musammat Nihalo or Gobardhan In the case of bigamy the person aggrieved is either the first husband or the second husband In the present case the first husband though sixteen years of age has preferred no complaint, neither has the second husband. I do not think that the father of the first husband can, under the circumstances of the present case be deemed to be the person aggrieved There is, therefore, no valid complaint of the offence under section 494 of the Indian Penal Code, and the provisions of section 198 of the Code of Criminal Procedure have not been complied with. The commitment, therefore, is bad and is hereby quashed The Magistrate will proceed to deal with the complaint under section 498 according to law.

1909

EMPEROR v. LALA.

## APPELLATE CIVIL

1909
*November 9.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji.*

PARBHU DAYAL (PLAINTIFF) v ALI AHMAD AND OTHERS (DEFENDANTS) *

*Civil Procedure Code* (1882), *section* 583—*Decree reversed on appeal—Restitution—Mesne profits—Jurisdiction of Court to which application for restitution is made*

It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it A court of appeal does not necessarily enter into the question whether a decree it is about to reverse has been executed or not *Hurro Chander Roy Chowdhry* v *Shoorodhonee Debia* (1) *Doraisami Ayyar* v *Annasami Ayyar* (2) and *Collector of Meerut* v *Kalka Prasad* (3) referred to *Kalka Singh* v *Paras Ram* (4) distinguished

A mortgagor obtained a decree for redemption and in execution thereof recovered possession of the mortgaged property On appeal, however, the High Court enhanced the sum payable by the plaintiff mortgagor and on his failure to pay the suit was dismissed The mortgagee thereupon applied to the Court of first instance asking to be restored to possession of the mortgaged property and also for mesne profits for the period during which he was out of possession *Held* that the subordinate Judge had jurisdiction not only to make restitution by restoring possession but also to award mesne profits, although the decree of the High Court did not specifically provide for mesne profits

* First Appeal No 498 of 1907 from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 27th of September 1907

(1) (1868) 9 W. R., 402
(2) (1899) I. L. R., 23 Mad., 306.
(3) (1906) I. L. R., 26 All., 665.
(4) (1894) I. L. R., 22 Calc., 434.

pargana Kanauj, were waqf property The defendant was a purchaser of a portion of the property The suit was resisted by him on the ground that the property was not waqf property The court of first instance declared that the idgah was endowed property, but dismissed the suit as to the lands adjoining The lower appellate court came to the conclusion that both the idgah and the lands adjoining were endowed property and decreed the suit in full The defendant appealed

Maulvi *Muhammad Ishaq*, for the appellant —

Plaintiffs' suit came under the provisions of section 42 of the Specific Relief Act The property having been found to be waqf property and no permission having been obtained from the Legal Remembrancer a suit of this nature was not maintainable under sections 92 and 93 of Act V of 1908 He cited *Wajid Ali Shah* v *Dianat ullah Beg* (1)

Babu *Balram Chandra Mukerji* (for Maulvi *Ghulam Mujtaba*) for the respondents —

Any Muhammadan who has a right as such to use a mosque has a right to have it declared that the property appertaining to the mosque is waqf property It is not necessary for him to show that he had any special interest in it He had a right to prevent anyone from claiming property in the mosque and the adjoining lands He relied on *Zafaryab Ali* v *Bakhtawar Singh* (2) *Jawahra* v *Akbar Husain* (3) *Raghubar Dial* v *Kesho Ramanj Das* (4) and Ameer Ali's *Mohammedan Law*, Vol I, p 439 (3rd edition)

STANLEY, C J and GRIFFIN J —The plaintiffs, who are seven in number and all residents of the city of Kanauj, instituted the suit out of which this appeal has arisen to have it declared that certain land in the village of Kandrauli in the pargana of Kanauj is waqf property appertaining as such to an *idgah* or mosque which was built by the Moghal Emperors It appears from the judgment of the lower appellate court that the land in question was recorded as *bagh idgah* at mauza Kandraul No 463, at the time of the settlement made under Regulation IX of 1833, and No 489 in the jamabandi of the settlement of 1872 The principal defendants are the purchasers of a part of

(1) (1885) I L. R., 8 All, 31
(2) (1883) I. L. R., 5 All 497.
(3) (1884) I L. R., 7 All, 178
(4) (1889) I L. R., 11 All, 18

to Parbhu Dayal who joined his vendors and their sisters in suing for redemption of the mortgage of 1863 in February 1902. This suit was eventually dismissed on the ground of non-joinder of parties in 1905 (I. L. R., 27 All., 570). Thereupon Parbhu Dayal instituted the present suit on the 16th of January, 1906. The Subordinate Judge dismissed the suit. The plaintiff appealed.

Dr. *Satish Chandra Banerji* (with him Babu *Jogindro Nath Chaudhri*), for the appellant:—The decree of the 31st of March, 1881, was passed without jurisdiction and the sale held under it was therefore a nullity. Under section 583, Civil Procedure Code, the decree holder was entitled to make an application for restitution, but not for anything that was not granted to him by the appellate decree The executing court was not competent to add anything to the High Court decree. It could only execute that decree. The mortgagee's claim for interest on the additional sum awarded to him had been disallowed. He had got the principal amount of the mortgage-money in his pocket and he was not entitled to any mesne profits He was entitled only to what he had lost and the court had no jurisdiction to grant him any additional relief under section 583; *Kalka Singh* v. *Paras Ram* (1). *Ishri Prasad* v *Ram Narain* (2). Restitution is for what a party has lost; *Dorasami Ayyar* v. *Annasami Ayyar* (3), and by no straining of language could it be said that Debi Das was entitled to the benefit of mesne profits under the decree passed in appeal. Unless a valid sale was established the mortgagee's possession would retain its original character and if the mortgagor's right was not affected by the sale he was not bound to have it formally set aside; *Moti Lal* v. *Karrabuldin* (4).

The mortgagee's conduct was tainted with fraud. He had taken an undue advantage of his position and had abstained from placing the full facts before the court. The purchase was not made in good faith. The mortgagee stood in a fiduciary relation to the mortgagor and it was his duty to speak; silence therefore amounted to fraud. The case of *Carew* v. *Johnston* (2 Sch. and Lef. 280) cited in *Nistarini Dassi* v. *Nundo Lall Bose* (5), was in point. The daughters of Zahur Ahmad in any case were

(1) (1894) I. L. R., 22 Calc., 434, 439.
(2) (1902) 6 C. W. N., 672.
(3) (1899) I. L. R., 23 Mad., 306, 310.
(4) (1897) I. L. R., 25 Calc., 179, 180.
(5) (1899) I. L. R., 26 Calc., 891, 913.

being a religious institution within the meaning of section 24 of Act VI of 1871 and therefore governed by the Muhammadan law Mr Ameer Ali in his work on Muhammadan law (Volume I, 3rd edition) at page 455, referring to the case *Jawahra v Akbar Husain*, observes as follows — "The judgement of the Allahabad High Court seems to be in conformity with the provisions of the Muhammadan law As has been already pointed out from *Radd-ul Mukhtar* and the *Fatwai Kazi Khan*, every Muhammadan who derives any benefit from a waqf or trust is entitled to maintain an action against the *mutawalli* to establish his right thereto, or against a trespasser to recover any portion of the waqf property which has been misappropriated, joining any other person who may participate with him in the benefit" At page 449 of the same volume the learned author comments on and expresses approval of the decision of this Court in *Zafaryab Ali v Bakhtawar Singh* above cited Now the plaintiffs have a right to frequent and use the mosque for devotion and the land adjoining is appurtenant to the mosque and according to the above rulings they can maintain their suit

The lower appellate court has found that the land adjoining the *idgah* is endowed property and this finding of fact is binding upon us in second appeal In view of the findings we are of opinion that the decision of the court below is correct We dismiss the appeal with cost

*Appeal dismissed.*

---

## REVISIONAL CRIMINAL

---

*Before Mr Justice Chamier*

EMPEROR *v* BISHESHAR BHATTACHARYA *

*Criminal Procedure Code section 556—Magistrate ordering prosecution as president of octroi sub committee—Jurisdiction—"Personally interested"*

A Magistrate as the president of the octroi sub committee of a Municipal Board ordered the prosecution of the accused and with the consent of the accused tried the case himself *Held* that the Magistrate must be deemed to have been personally interested within the meaning of section 556 of the Code of Criminal Procedure and was not qualified to try the case of the applicant whose consent

---

* Criminal Revision No. 239 of 1910 against the order of A P. Collett, Joint Magistrate of Benares, dated the 5th of April, 1910

equity of redemption in the 7 biswas, to Abdul Rashid, Abdul Aziz and Mahmud Khan, defendants, sons of Zahur Ahmad Khan. In 1871 Zahur Ahmad Khan purchased at auction 2 biswas 19 biswansis 10 kachwansis out of the remainder of the mortgaged property. The remaining 10 kachwansis were purchased by Debi Das, who thus broke up the integrity of the mortgage. Zahur Ahmad Khan died in 1873 leaving him surviving the three sons above mentioned, five daughters, and two widows. In 1877 the three sons, under the guardianship of their mother, brought a suit for redemption of the mortgage of 1863 against Debi Das. On the 25th of May, 1878, the suit was decreed by the Court of first instance, the decree providing that the plaintiffs should pay to the mortgagee Rs. 6,907-1-1. On the 17th of July, 1878, the plaintiffs to that suit obtained possession of the mortgaged property in execution of that decree. Debi Das preferred an appeal to this court, and on the 2nd of June 1879, this Court held that the mortgagee was entitled to a further sum amounting to nearly Rs. 9,000 and varied the decree of the court below by directing payment of the above sum in addition to the amount which the decree of the court of first instance had ordered the plaintiffs to pay. The additional sum so awarded was not paid by the plaintiffs and the result was that the decree became infructuous. Debi Das thereupon applied for and resumed possession on the 1st of April, 1880. He then asked the Court to grant him mesne profits for the period during which he was out of possession by reason of the plaintiff's having executed the decree obtained by them from the court of first instance. On the 13th of March, 1881, the court awarded to him Rs. 5,615-14-10 as mesne profits. For the realisation of this amount Debi Das caused the equity of redemption of the plaintiffs to that suit to be sold by auction on the 20th of August, 1881, and himself purchased it. In 1886 he mortgaged the 10 biswas to Sagar Mal and Jamna Das, who obtained a decree on their mortgage and caused 9 biswas 10 biswansis 10 kachwansis to be sold by auction. This was purchased by Dilsukh Rai and Ali Ahmad, defendants, first party. On the 7th of December, 1901, the three sons of Zahur Ahmad Khan sold 4 biswas of the property to the present plaintiff Parbhu Dayal. In 1902, Parbhu Dayal, his vendors,

could not confer jurisdiction upon him *Emperor* v *Mohan Lal* (1) distinguished *In the matter of the petition of Inayat Husain* (2) referred to

THE facts of this case are fully stated in the judgement of the Court

Babu *Satya Chandra Mukerji* (with him Babu *Surendra Nath Sen*), for the applicant

The Assistant Government Advocate, (Mr *R Malcomson*) for the Crown

CHAMIER, J —This is an application for revision of an order of the Joint Magistrate of Benares, convicting the applicant of evading the payment of octroi, an offence punishable under section 69 of the United Provinces Municipalities Act, and sentencing him to pay a fine of Rs 20 It has been contended before me that the articles in respect of which the applicant has been convicted are not subject to octroi In view of the order which I am about to pass, I express no opinion upon this point The question which I have to decide is whether the Magistrate had jurisdiction to try the case In his order he says —"I would note that at the first hearing I asked counsel for the defence to apply for the transfer of the case, as the prosecution had been initiated by me *ex officio* as the president of the octroi sub committee He elected to let the case remain in this court" It is quite clear that if the case falls within section 556 of the Code of Criminal Procedure as is now contended by the applicant, the Magistrate was debarred from trying the case, and the consent of the applicant could not confer jurisdiction upon him The only facts which need be stated are that some correspondence passed between the applicant and the Octroi Superintendent ending with a letter from the applicant, dated the 2nd of March, 1910, in which he declined to give any further information The whole correspondence was then laid before Mr A P Collett who was president of the octroi sub committee of the Municipal Board The file does not show that the papers were laid before him as president of that sub committee, but the fact is admitted and there can be no doubt about it On the file he wrote as follows — Whether the goods are dutiable or not, it seems that the importer's correct procedure was to pay and then appeal

(1) (1901) I L R 27 All., 25 (2) Weekly Notes 1893, p 74.

A similar view was held by the Madras High Court in *Dora sami Ayyar* v *Annasami Ayyar* (1) and by this High Court in the *Collector of Meerut* v *Kalka Prasad* (2) The absence of a specific direction in the decree of the High Court for payment of mesne profits did not deprive the court, which made the order of the 31st of March, 1881, of its jurisdiction to award mesne profits by way of restitution It is clear that the court which could enforce the liability of the defeated plaintiffs to make restitution was the court of first instance That court had jurisdiction not only to restore to the mortgagee the possession which he had lost, but all other benefits of which he had been deprived As we have stated above, the decree of the High Court awarded to the mortgagee a further sum in addition to that awarded by the court of first instance and the effect of the non payment of this additional sum was that the suit stood dismissed The mortgagee contended that under the terms of the mortgage he had the right to continue in possession and to receive the rents and profits so long as any amount remained due to him under the mortgage and was therefore entitled to the rents and profits which he did not obtain during the period of his dispossession The only Court which could determine the question thus raised, and had jurisdiction to decide that question, was the court of the Subordinate Judge It had jurisdiction to decide whether mesne profits should or should not be awarded Whether its decision was correct or erroneous is immaterial, as the court had jurisdiction to decide rightly and to decide wrongly Even if it be assumed that it erred in awarding mesne profits, it cannot be said that it acted without jurisdiction Dr *Satish Chandra Banerji*, the learned advocate for the appellant, strenuously relied on the ruling of their Lordships of the Privy Council in *Kalka Singh* v *Paras Ram* (3) That ruling is in our judgment wholly inapplicable to the present case There a court had made a decree for possession but not for mesne profits The court executing the decree, in spite of the absence of a direction in the decree itself as to the payment of mesne profits, awarded such profits to the decree holder and sold the judgment debtor's property for the realisation thereof It was held that the order of the court, executing the decree for the award of mesne

1909

PARBHU DAYAL v. ALI AHMAD

(1) (1899) I. L. R. 23 Mad 306 (2) (1906) I. L. R., 28 All., 665
(3) (1894) I L R., 22 Calc 434

the Board If the importer still persists that the goods are not dutiable, it is a question best decided by a court, and he should be prosecuted in order to have it finally settled "

On that the Secretary of the Board noted at once " prosecute," and sent the papers to the Octroi Inspector who made them over to a mukhtar in order that a complaint might be drawn up The complaint was ultimately presented to Mr Collett It is quite clear to me that Mr Collett's order was intended to be and was understood to be an order for the prosecution of the applicant It is not a case like that of *Emperor* v *Mohan Lal* (1), in which the Magistrate concerned was merely one of a body of members of the Municipal Board, who did not direct the prosecution but merely handed in a recommendation, upon which the Chairman of the Board took action In that case, KNOX J, referred to and distinguished the case of *Emperor* v *Ahmad Husain,* decided by the present learned Chief Justice. He observed that in *Ahmad Husain's* case it was alleged that the Joint Magistrate who tried the case was the Chairman of a special meeting of the committee which ordered the prosecution of the accused The present case is stronger than that of *Ahmad Husain,* for Mr Collett does not seem to have acted with the sub committee, but alone and on his own responsibility It was contended that the case fell rather within the explanation to section 556 than within the illustration to that section The difference between the two classes of cases was pointed out by STRACHEY, C J, in *Inayat Husain* (2) In the course of his judgement he says —' It has, however, been contended that he is disqualified on the ground of the principle embodied in the new illustration to section 556 That illustration is as follows —'A, as Collector upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws A is disqualified from trying this case as a Magistrate ' The illustration simply embodies the principle that a man cannot be both prosecutor and judge in the same case What the section shows is that if a magistrate or a judge is merely connected with a case by reason of his discharging some other public functions or is concerned with it in some public

(1) (1904) I L R 27 All., 25 (2) Weekly Notes, 1899, p 74.

1909

PARBHU DAYAL *v.* ALI AHMAD.

Therefore, so far as the 4 biswas share conveyed by the sale deed of the 7th of December, 1901, is concerned, it was the property which was owned by the three brothers before the auction sale of 1881. As for the 1 biswa sold to the plaintiff under the sale-deed of the 7th of July, 1905, it is described in the sale-deed as being part of *khatas* Nos. 2 and 3. The *khata* No 2, consists of 1 biswa 9 biswansis 15 kachwansis, which, it is admitted in the plaint, was given by Zahur Ahmad Khan in his life time to his three sons. The third *khata*, no doubt, comprises property left by Zahur Ahmad at his death and inherited by his heirs, but as only 1 biswa out of *khatas* 2 and 3 was sold to the plaintiff and the plaintiff's vendors owned a larger share than 1 biswa in those *khatas* in their own right, and not as heirs to their sisters, we see no reason to presume that they intended to include in the sale a part of the share inherited by them from their sisters We are therefore not satisfied that the sale to the plaintiff comprised any part of the property which his vendors may have acquired by right of inheritance to their sisters.

The last contention on behalf of the appellant is, that he is also a lessee from the three sons of Zahur Ahmad Khan and as such is entitled to claim redemption. The nature of the so-called lease is set forth in paragraph 5 of the plaint. It is manifest that the lease has not come into force and that in reality what is called a lease is only an agreement to grant a lease, which would come into operation in the event of the lessors recovering possession of the property now in the hands of transferees from the mortgagee. By virtue of a transaction of this nature the plaintiff is not entitled to claim redemption.

For these reasons we agree with the court below in holding that the plaintiff's suit was untenable and accordingly dismiss the appeal with costs.

*Appeal dismissed.*

capacity he is not on that ground alone to be deemed personally interested in the case But if, in addition to a connection of that sort, he, in some capacity outside his magisterial or judicial functions, orders or directs the prosecution of a person for an offence, then he is deemed to be personally interested in the case and he cannot try it as magistrate or judge The distinction is between having merely some public official connection with a case and ordering or directing the prosecution in some extra judicial or extra magisterial capacity" In the present case, as I have said, the magistrate ordered the prosecution of the applicant I cannot accept the suggestion that the prosecution was directed by the secretary He treated Mr Collett's endorsement as an order to prosecute and merely set the machinery in motion In accordance with the decisions which I have mentioned I hold that the Magistrate in this case must be deemed to have been personally interested within the meaning of section 556 of the Code of Criminal Procedure, and therefore was not qualified to try the case of the applicant I set aside the conviction and direct that the case be retried by the District Magistrate or by some competent Magistrate nominated by him.

*Conviction set aside—Retrial ordered*

## APPELLATE CIVIL

*Before Sir John Stanley Knight Chief Justice and Mr Justice Griffin*

UGAR SEN (DEFENDANT) v LAKHMI CHAND AND ANOTHER (PLAINTIFFS) *

*Partnership—Suit by surviving member to recover debt due to firm—Representatives of deceased members not necessary parties to suit—Act No IX of 1872 (Indian Contract Act), section 45*

*Held* that the representatives of a deceased partner are not necessary parties to a suit for recovery of a debt which accrued due during the lifetime of the deceased partner *Held* also that section 45 of the Indian Contract Act does not apply to a suit to recover a debt due to a partnership firm *Gobind Prasad v Chandar Sekhar* (1), *Motilal Bechardass v Ghellabhai Hariram* (2) and *Debi Das v Nirpat* (3) followed

* Second Appeal No 1005 of 1909 from a decree of Udit Narayan Sahai, Subordinate Judge of Jhansi dated the 12th of July 1909 confirming a decree of P K Ray Munsif of Jhansi dated the 23rd of March 1909

(1) Weekly Notes 1887 p 133 (2) (1892) I L R, 17 Bom, 6
(3) (1898) I L R, 20 All, 365

relinquished his interests in the promissory notes in favour of Musammat Parbati, nothing remained to him to inherit after her death The executing court disallowed the objection Baijnath Das therefore instituted this suit for a declaration that Sheo Das had no interest in the promissory notes and that they could not be attached in execution of a decree against him The main defence taken was that the deed of relinquishment executed by Sheo Das in favour of Musammat Parbati was void The Subordinate Judge overruled this plea and decreed the suit The defendants appealed

Maulvi *Muhammad Ishaq* for the appellants contended, that thedeed of relinquishment purporting to convey the reversionary interest of Sheo Das was bad under section 6 of the Transfer of Property Act, 1882 It transferred no interest to Musammat Parbati and the right of Sheo Das remained unaffected He cited *Jagan Nath* v *Dibbo* (1) *Achhan Kuar* v *Thakur Das* (2) and *Nund Kishore Lal* v *Kanee Ram Tewary* (3)

Babu *Lalit Mohan Banerji* (with him Munshi *Kalindi Prasad*), for the respondents replied

STANLEY, C J, and BANERJI J —The facts of this case are these —One Ghaibi Ram died leaving three sons, Baijnath Das, Sheo Das and Gauri Shankar and a widow Musammat Parbati After the death of Ghaibi Ram the three sons separated Gauri Shankar died leaving some cash and jewelry His widow Musammat Rambha was at the time a minor A guardian of the property of the minor was appointed by the court and he sold the jewelry and with the proceeds of the sale of the jewelry and with the money left by Gauri Shankar he purchased Government promissory notes of the face value of Rs 17 600 Upon the death of Musammat Rambha the promissory notes passed to Musammat Parbati, the mother of Gauri Shankar as the next heir to his property On the 1st of August 1904 Sheo Das executed a document in favour of Musammat Parbati, whereby he purported to convey to her and release in her favour all his interest in the promissory notes referred to above Musammat Parbati is now dead and the only heirs left by her are her two sons Baijnath Das and Sheo Das The appellant, Hargawan Magan, and Mul Chand,

(1) Weekly Notes (1908) p 284. (2) (1895) I L R., 17 All 125
(3) (1902) I L R 29 Calc. 855

The facts which gave rise to this appeal were shortly these. One Ugar Sen borrowed money from Badri Das and Hira Lal, 1
who were members of a partnership firm. Both died, Badri Das leaving a son Lakhmi Chand, and Hira Lal a minor son Chote Lal. After this the only surviving member of the partnership, Mohan Lal, joined with Lakhmi Chand in suing to recover the debt. The court of first instance (Munsif of Jhansi) gave the plaintiffs a decree, which was confirmed on appeal by the Subordinate Judge. The defendant appealed to the High Court urging that Chhote Lal also ought to have been made a party to the suit.

Babu *Satya Narain*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondents.

STANLEY, C J. and GRIFFIN J :—The suit, out of which this appeal has arisen, was brought by Lakhmi Chand and Mohan Lal to recover moneys alleged to have been borrowed from them by the defendant appellant Ugar Sen. The money was borrowed from Badri Das and Hira Lal who were members of a partnership firm, and both of them are dead. The only surviving member of the partnership is the plaintiff, Mohan Lal. The other plaintiff, Lakhmi Chand, is the son of Badri Das. Hira Lal left a minor son named Chote Lal. Both the Courts below have decreed the plaintiffs' claim. This second appeal has been preferred, and the ground of appeal pressed by the learned vakil for the appellant is that the plaintiffs are not entitled to maintain their suit without having before the court the legal representatives of the deceased Hira Lal. The learned vakil relies upon the provisions of section 45 of the Indian Contract Act. We are of opinion that that section in no way bars the present suit, which is one to recover a debt due to a partnership firm. In the case of *Gobind Prasad* v. *Chandar Sekhar* (1) the question was very fully considered by EDGE, C. J. and MAHMOOD, J., whether, in a suit such as the present, it was necessary for the plaintiff to implead the legal representatives of a deceased partner. It was held in that case that there was no such necessity. The reasons for the judgement are given at considerable length, the principle of the English law on the subject

(1) Weekly Notes, 1887, p 133

being adopted as being based on common sense In the later case of *Motilal Bechardass* v *Ghellabhai Hariram* (1) the same question was considered, and the conflicting decisions of the High Court of Calcutta and the High Court of Allahabad were discussed The learned Judges, BAYLEY and FARRAN, JJ, held that the Allahabad High Court was correct and that the representatives of a deceased partner are not necessary parties to a suit for recovery of a debt which accrued due during the lifetime of the deceased partner In that case the provisions of the Contract Act were considered and dealt with In the later case of *Debi Das* v *Nirpat* (2) BLAIR and BURKITT, JJ, followed the earlier ruling of this Court In view of these decisions the case before us was rightly decided by the courts below We are no prepared to dissent from well considered judgements of the Court. We dismiss this appeal with costs

*Appeal dismissed*

---

*Before Sir John Stanley Knight Chief Justice, and Mr Justice Griffin*

RAMPHAL THAKUR (PLAINTIFF) v PAN MATI PADAIN AND OTHERS (DEFENDANTS)*

*Hindu law—Mitakshara—Succession—Daughter s daughter s sons—Bandhus —Alienation by Hindu widow—Legal necessity*

*Held* that under the Mitakshara law a daughter s daughter s son is a *bandhu* and in the absence of any other heir is entitled to succeed to the estate of the last owner *Ajudhia* v *Ram Sumer Misr* (3) followed

THIS was a suit to enforce payment of money secured by a mortgage, dated the 31st of January, 1896, executed by one Musammat Phulmani deceased The property mortgaged, originally belonging to one Beni, upon his death descended to his widow Musammat Chunna, and on her death to Musammat Phulmani Musammat Phulmani had two daughters, Pan Mati and Parbati, and the latter two minor sons Sundar and Ram Piaro The Court of first instance (Munsif of Deoria) decreed the claim, but on appeal this decree was reversed and the plaintiff's suit dismissed by the District Judge of Gorakhpur upon the

---

* Second Appeal No. 1080 of 1909 from a decree of F D Simpson District Judge of Gorakhpur dated the 26th of July 1909 reversing a decree of L.. Prasad Munsif of Deoria dated the 10th of December 1908

(1) (1892) I L. R. 17 Bom., 6 (2) (1898) I L. R., 20 All. 365
(3) (1909) I. L. R., 31 All., 454

Registered No. A 422.

VOL. XXXII.] [PART III



# THE INDIAN LAW REPORTS.

MARCH 1910.

(Pages 91—147.)

## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY

Privy Council ... J. V. WOODMAN, *Middle Temple*

High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*



ALLAHABAD:

PRINTED BY F. LUKER, SUPERINTENDENT, GOVERNMENT PRESS,
*AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT,*
UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

Price, Re. 1.

by the plaintiffs the lower appellate court found that the defendants had dealings with the plaintiffs, but that they did not acknowledge their liability by stating accounts in August 1904, as alleged by the plaintiffs. That court accordingly affirmed the decree of the first court upon the ground that the claim was time-barred. The plaintiffs appealed to the High Court.

Mr. *G. W. Dillon* and Munshi *Jang Bahadur Lal*, for the appellants.

Babu *Durga Charan Banerji* and Munshi *Gokul Prasad*, for the respondents.

BANERJI and ALSTON, JJ.—The suit out of which this appeal has arisen was brought by the plaintiffs appellants to recover from the defendants respondents Rs. 1,235-15-6 as the balance of an account existing between the parties. The allegations of the plaintiffs are that an account of dealings between them and the defendants was opened on Maghsar Sudi 9th, Sambat 1956, corresponding to the 11th of December, 1899; that on the 13th of August, 1904, the account was stated by the parties and a balance of Rs. 2,394-9-3 was struck in favour of the plaintiffs; that subsequently the plaintiffs realised Rs. 1,479-10 6 on account of the price of wheat sold by them for the defendants and the defendants were debited with the sum of Rs. 312-14 0 on account of interest and other charges and that the amount claimed was due by them. The defendants asserted that they had no dealings with the plaintiffs and denied that any account was stated or that any sum was due by them. The court of first instance found in favour of the defendants and dismissed the suit. Upon appeal by the plaintiffs the lower appellate court found that the defendants had dealings with the plaintiffs, but that they did not acknowledge their liability by stating accounts in August, 1904, as alleged by the plaintiffs. It accordingly affirmed the decree of the court of first instance on the ground that the claim was time-barred. The plaintiffs have preferred this appeal, and it is contended on their behalf that having regard to the nature of the dealings between the parties and of the accounts, the suit ought to have been treated as one for the balance due on a mutual open and current account where there had been reciprocal demands between the parties, and that under article 85,

## BOOKS AND PUBLICATIONS FOR SALE
BY THE
## SUPERINTENDENT OF GOVERNMENT PRINTING, INDIA,
### 8 HASTINGS STREET, CALCUTTA

*All books published by the Superintendent of Government Printing, India, can be purchased either directly or through the following or any other booksellers:—*

AGENTS.

CALCUTTA—*Thacker, Spink & Co*
MADRAS—*Higginbotham & Co*
BOMBAY—{ *Thacker & Co, Ld*; *Radhabai Atmaram Sagoon* }

NOTICE.—*Books required for private use only can be purchased. Application should be accompanied by a remittance unless it is wished that the books should be sent by value payable post, in which case, besides the ordinary postage, an additional charge will be made for registration and commission.*

*Books required for the Public Service should be obtained through Local Governments.*

---

☞ *The amounts within parentheses are for packing and postage.*

---

# List of Books and Publications for sale which are less than two years old

---

## LEGISLATIVE DEPARTMENT.

---

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No 8, Hastings Street, Calcutta.]

PRICES OF THE GENERAL ACTS, LOCAL CODES, MERCHANT SHIPPING, DIGEST, INDEX TO ENACTMENTS AND THE DIGESTS OF INDIAN LAW CASES, 1901 TO 1907 (SEPARATELY AND PER SET OF FIVE VOLUMES) HAVE BEEN CONSIDERABLY REDUCED.

THE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPARTMENT.

---

### I.—THE INDIAN STATUTE BOOK

REVISED EDITION

*Super royal 8vo cloth lettered*

B.—GENERAL ACTS

| | |
|---|---|
| General Acts of the Governor General in Council, Vol I, from 1834 to 1867, Edition 1909 | Rs 6 (10a) |
| General Acts of the Governor General in Council, Vol II, from 1868 to 1878, Edition 1909 | Rs 7 (10a) |
| General Acts of the Governor General in Council, Vol III, from 1879 to 1886, Edition 1909 | Rs 6 (9a) |
| General Acts of the Governor General in Council, Vol IV, from 1887 to 1897, Edition 1909 | Rs 6 (9a) |
| General Acts of the Governor General in Council, Vol V, from 1898 to 1903, Edition 1909 | Rs 6 (9a) |

Volume VI is in the Press

C.—LOCAL CODES

| | |
|---|---|
| The Bengal Code, Third Edition 1905, containing the Regulations and Local Acts in force in Bengal, Vols I to V, Rs 6 a volume or Rs 30. Reduced to Rs 20 for set of 5 Vols | Rs 6 (9a) |

I would allow this appeal, set aside the order of the Court below and make an order of adjudication under section 16 of the Insolvency Act against both the appellants. I would give the appellants their costs in this Court

KARAMAT HUSAIN J—I agree.

BY THE COURT.—The order of the Court is that the appeal is allowed, the order of the Court below is set aside with costs and the appellants are adjudicated insolvents under section 16 of the Insolvency Act.

*Appeal allowed. Order set aside.*

---

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Griffin.*

BRIJ LAL SINGH AND ANOTHER (PLAINTIFFS) v BHAWANI SINGH AND OTHERS (DEFENDANTS)*

*Mortgage—Redemption—Clog on the equity of redemption—Two mortgages—Covenant to pay the second mortgage before the first—Consolidation*

Under a covenant contained in a mortgage of the year 1867 the mortgagees took possession of the mortgaged property Subsequently the mortgagors took a further advance from the mortgagees and gave them a second mortgage on the same property in which they covenanted that they would pay off the amount due on the second mortgage before redeeming the first *Held*, on suit by the mortgagors to redeem the mortgage of 1867, that this was an admissible covenant and not a clog on the equity of redemption *Bhartu* v *Dalip* (1) distinguished. *Muhammad Abdul Hamid* v *Jasraj Mal* (2) referred to

In second appeal the plaintiffs mortgagors were allowed to amend their plaint so as to include a prayer for redemption of both the mortgages.

THE facts of this case were as follows:—

Under a simple mortgage executed on August 2nd, 1867, the mortgagee was competent to take possession if the mortgage money was not paid within a certain time. A subsequent simple mortgage was executed by the same mortgagors in favour of the same mortgagees with the stipulation attached that money due on the second bond was to be paid before the prior mortgage could be redeemed. The money was not paid under the first mortgage bond within the time specified and the mortgagees took possession of the property. The representatives of the mortgagors brought this suit for redemption

---

* Second Appeal No 1041 of 1909 from a decree of Jagat Narayan, second Additional Judge of Aligarh, dated the 8th of June, 1909, reversing a decree of Muhammad Husain, Munsif of Etah, dated the 19th of January, 1909.

(1) Weekly Notes, 1907, p. 278. (2) Weekly Notes, 190[illegible], p. 257.

Act I of 1872 (Evidence), as modified up to 1st May, 1908 ... ... Re. 1. (2 a)
Act IX of 1872 (Contract), as modified up to 1st February, 1908 ... Re. 1 4 a. (2 a.)
Act I of 1878 (Opium), as modified up to 1st October, 1907 ... 5 a. 6 p (1 a)
Act VI of 1878 (Treasure Trove), as modified by Act XII of 1891, as reprinted on the 14th February, 1908 . ... ... 2 a 9 p. (1 a)
Act VIII of 1878 (Sea Customs), as modified up to 1st June, 1908 Rs 1-5-3 (4 a.)
Act XI of 1878 (Arms), as modified up to 1st October, 1908 6 a (1 a)
Act XVI of 1879 (Transport of Salt), as modified up to 1st October, 1907 1 a 6 p. (1 a)
Act XVIII of 1881 (Central Provinces Land-revenue), as modified up to 1st March, 1907 .. .. . .. .. Rs 1-2 (3 a)
Act IV of 1884 (Explosives), as modified up to 1st September, 1908 . 4 a 9 p (1 a)
Act III of 1888 (Police) as modified up to 1st January, 1909 . . 1 a 9 p (1 a)
Act II of 1889 (Measures of Length with footnotes) 1 a. 3 p. (1 a)
Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st August, 1908 . . ... . .. 6 a (1 a)
Act VI of 1889 (Probate and Administration), as modified up to 1st January, 1909 . .. ... 2 a 9 p (1 a.)
Act VI of 1890 (Charitable Endowments), as modified up to 1st August, 1908 . ... ... ... . 2 a. 6 p (1 a)
Act XI of 1890 (Prevention of Cruelty to Animals), with foot-notes 2 a (1 a)
Act XIII of 1890 (Excise Malt Liquors), as modified up to 1st October, 1908 .. 1 a. 6 p (1 a)
Act VIII of 1899 (Petroleum) as modified up to 1st January, 1909 ... 7 a (1 a.)
Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February, 1908 ... ... . ... 2 a. 6 p (1 a)
Act X of 1904 (Co-operative Credit Societies) with reference to rules under the Act .. .. .. 6 a 6 p (1 a)

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN CO[UNCIL] AS ORIGINALLY PASSED

Acts (Unrepealed) of the Governor General of India in Council from 1907 up to date

[Regulations made under the Statute 33 Vict., Cap 3 from 1907 up to date

The above may be obtained separately The price is noted on each]

## IV—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENE[RAL] OF INDIA IN COUNCIL

Act XIII of 1857 (Opium), as modified up to 1st August, 1908 .. In Urdu 9 p. (1
Ditto ditto In Nagri. 9 p. (1
Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August, 1908 ... ... In Urdu 6 p (1 a
Ditto ditto . In Nagri 6 p (1
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907 . . ... .. In Urdu 1 a 3 p
Ditto ditto ... In Nagri 1 a 3 p
Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908 . . ... In Nagri 2 p (1 a
Act I of 1872 (Evidence), as modified up to 1st May, 1908 .. . In Urdu 8 a (2 a)
Ditto ditto ... ... In Nagri 8 a (2 a
Act I of 1878 (Opium), as modified up to 1st October, 1907 .. In Urdu 1 a 6 p
Ditto ditto .. In Nagri 1 a 6 p
Act XIII of 1889 (Cantonments), as modified up to 1st October 1907 In Urdu 3 a (1 a
Act XII of 1896 (Excise, as modified up to 1st March, 1907 ... In Urdu 2 a 6 p
Ditto ditto . In Nagri 2 a 6 p
Act XIII of 1899 (Glanders and Farcy) as modified up to 1st Febru[ary]

of the earlier mortgage without offering to redeem the subsequent mortgage The court of first instance decreed the plaintiffs' suit for redemption without requiring them to redeem the subsequent mortgage The lower appellate court reversed the decree The plaintiffs appealed to the High Court

Dr. *Tej Bahadur Sapru* (with him The Hon'ble Pandit *Moti Lal Nehru*), for the appellants, argued that the stipulation in the subsequent mortgage deed amounted to a clog on the equity of redemption He cited *Sheo Shankar* v *Parma Mahton* (1), *Ranjit Khan* v *Ramdhan Singh* (2), *Muhammad Abdul Hamid* v *Jairaj Mal* (3) and *Bhartu* v *Dalip* (4)

The two transactions were quite independent and there was no consolidation

Dr. *Satish Chandra Banerji* (with him Babu *Girdhari Lal Agarwala*), for the respondents, contended that when the property was mortgaged in 1867, the mortgage was simple, but the mortgagees could take possession in default of payment, and when they did so, the mortgage became usufructuary. The same mortgagees made another advance in 1874 The law governing such transactions was laid down in Coote, *Law of Mortgages*, ed 7, vol 2, p 1168, Ghose, *Law of Mortgage*, ed 5, p 271, and *Ram Das* v. *Smirkha* (5) It had been consistently held in the Allahabad High Court that there would be no clog where the covenant was for the redemption of both the mortgage simultaneously. The argument in favour of consolidation would be stronger were the covenant was that the second mortgage should be redeemed first The case in I L R, 31 All, collects all the earlier cases. Section 61 of the Transfer of Property Act did not apply to cases where the property comprised in the second mortgage was the same as in the first mortgage; *Dorasami* v. *Venkata Seshayyar* (6) Cases where the second bond was a money bond were to be distinguished from cases where the second bond was a mortgage bond. The case in I L R, 26 All, was of the former kind.

(1) (1901) I L. R., 26 All., 559
(2) (1909) I L. R., 31 All. 482
(3) Weekly Notes, 1906, 267
(4) Weekly Notes, 1906 p 278
(5) (Unreported) S. A. 142 of 1901 referred to in I. L. R., 31 All., 492.
(6) (1901) I. L. R., 25 Mad., 108, 115

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India 1901 with an Index of cases, compiled under the orders of the Government of India, by C E. Grey Bar at Law, Edition 1907 Rs 5 Reduced to Rs 1 4-0 per copy .. (6 a)

Ditto .. ditto 1905 by C E Grey Bar-at-Law, Edition 1907 .. Rs 5 Reduced to Rs 1-4-0 per copy (6 a)

Ditto ditto 1906 by C E. Grey Bar-at Law Edition 1908 Reduced to Rs 1 4-0 per copy (6 a)

Ditto ditto 1907 by B. D Bose Bar-at-Law Edition 1908 Reduced to Rs 1-4-0 per copy (5 a)

(Set of Digests from 1901—1907 Reduced to Rs 10 per set of 6 volumes)

General Rules and Orders made under enactments in force in British India consisting of General Rules Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index In three Volumes Rs 15. Reduced to Rs 10 per set (Rs 2) or Rs 5 per Vol (12 a.)

Title page and Contents of the Acts passed by the Governor General of India in Council in the year 1907 . .. .. 1 a 6 p (1 a)

Dr *Tej Bahadur Sapru*, in reply —

The question was one mainly of intention The case in I L R, 25 Mad, 108, did not apply. Consolidation could only be a matter of agreement, unless there was a definite provision of law to that effect In any case there was a conflict of decisions in this Court, the two rulings in the Weekly Notes for 1906 not being in harmony

STANLEY, C J —This second appeal arises out of a suit for redemption of a mortgage of the 2nd of August, 1867, and the circumstances under which it was brought are as follows —The predecessors in title of the plaintiffs borrowed money from one Kharagjit deceased, and as security therefor, hypothecated their share in the village of Badhaula The mortgage provided that if the mortgagors failed to repay the money borrowed in Jeth 1275 Fasli, the mortgagee should be at liberty to take possession of the mortgaged property Default was made in payment of the mortgage debt, and the mortgagee took possession of the mortgaged property Later on, namely, on the 3rd of July, 1874, a further mortgage to secure a small sum was executed by the mortgagors in favour of Kharagjit In that document it is recited that the sum of Rs 98 was due by the mortgagors to Kharagjit and the executants thereby agreed to pay interest on that amount at the rate of Rs 2 per cent on demand In order to secure the amount the mortgagors hypothecated their share in the village in question in favour of the mortgagees, and then follows the covenant upon which the arguments in this case are mainly based The covenant is as follows —"We shall repay the amount due under this bond, before payment of the mortgage money and redemption of the mortgage" (i e, the earlier mortgage) The suit out of which this appeal has arisen was brought for redemption of the mortgage of the 2nd of August, 1867, alone, and the defence set up was that the mortgagors were bound to pay the amount due on foot of the subsequent mortgage of the 3rd of July, 1874, along with or before payment of the money due on foot of the earlier mortgage of the 2nd of August, 1867.

The court of first instance decreed the plaintiff's claim, but upon appeal the learned Additional District Judge reversed its

# TABLE OF CASES REPORTED.

PAGES

## PRIVY COUNCIL.



## APPELLATE CIVIL.



## APPELLATE CRIMINAL



## REVISIONAL CRIMINAL

decision, holding that upon the language of the document of the 3rd of July, 1874, the mortgagors were bound to satisfy the amount of that mortgage before they could insist upon redemption of the earlier mortgage

The case before us has been argued at considerable length and ably, and numerous authorities have been cited to us. I do not think it necessary to review these authorities at length I think that the learned Additional District Judge rightly decided the appeal before him. It is contended by Dr *Tej Bahadur Sapru* on behalf of the appellant that the case is governed by the decision of a Bench of this Court in the case of *Bhartu* v *Dalip* (1) That case at first sight appears to have a close bearing upon the case before us, but it will be observed on closer scrutiny that in the judgement of myself and my brother KNOX, care was taken to distinguish it from a case such as that with which we are now dealing It was held in that case that upon the true construction of two documents, one being a usufructuary mortgage and the other a simple mortgage, there was no consolidation of the two mortgages and that the mortgagor was therefore competent to redeem the first mortgage without redeeming the second In our judgement we observed —"It may be that if the parties to mortgage transactions determine and agree so to consolidate mortgage securities as to preclude the mortgagor from redeeming one without redeeming the other their contract in that regard would be enforced. But in this case we are unable to discover that there was any such clear and distinct contract entered into between the parties as obliged the mortgagor to redeem both mortgages at the same time" And later on — "There is an express provision in the later deed that the mortgaged land should not be redeemed unless the mortgagor paid the amounts which had been ear marked in the earlier passage as being the two sums, namely, one of Rs 1,000, secured by a bond of the 17th of May, 1881, and the other the farther advance of Rs 500" (which was secured by a second mortgage of the 17th of June, 1881) "From this we gather that the parties contemplated that the mortgagor should be at liberty to redeem the later mortgage on payment of the two sums secured by it.

(1) Weekly Notes 1900, p 273

# TABLE OF CASES CITED

namely, Rs 1 500 If he was so at liberty to redeem that mortgage at any time, there is no reason why he should be precluded from redeeming the earlier mortgage by payment of the amount secured by it."

Unlike this case, the covenant which we have before us is specific and clear The mortgagors in it undertook to repay the amount due under the second bond before payment and redemption of the earlier mortgage In view of this specific covenant on the part of the mortgagors it would be, I think, inequitable to hold that the mortgagors, despite their covenant, can redeem the earlier mortgage alone, leaving the second incumbrance unsatisfied The case is similar to the case of *Muhammad Abdul Hamid* v *Jairaj Mal* (1) In that case the mortgagors having taken a further advance on the security of a second mortgage of the same property covenanted that they would not be at liberty to redeem it without at the same time redeeming the first It was held by Mr Justice RUSTOMJEE and myself that this was a valid covenant and did not amount to a clog or fetter on the right of redemption, and that both mortgages must be redeemed at the same time

The same question came before my brothers BANERJI and TUDBALL in Second Appeal No. 142 of 1908, decided on the 28th of April, 1909 (as yet unreported) In that case there was a first mortgage of property, and then a second mortgage deed of Asarh Badi 15th, 1949, was executed which provided as follows — "Whenever I am paying off the mortgage debt (i e, the debt due under the first mortgage) I shall first pay the principal sum due under this document with compound interest and then the amount of the mortgage" Another mortgage deed of Magh Badi 10th, 1952, contained this provision —"Whenever I, the said debtor, shall pay off the mortgage debt in the month of Jeth of any year, I shall first pay the principal sum with interest due under this bond in a lump sum and then the mortgage money I shall then take back the fields and the documents" The property comprised in the first mortgage was made in that case security for the amounts secured by the two mortgages, extracts from which I have given It was held, upon a true construction

(1) Weekly Notes, 1906 p 27

# INDEX.

PAGE.

of these documents, that the mortgagor contemplated simultaneous payment of the amounts of the three documents and that the two later documents placed a further charge on the property which was the subject of all the three mortgages, and there was thus a consolidation of the three mortgages, and the mortgagors were not entitled to recover possession of the mortgaged property unless the amount secured by the three mortgages were paid. I concur in that decision. The covenant in the present case is a covenant in effect not to pay off the earlier mortgage without first paying of the puisne incumbrances. Despite this covenant the plaintiffs appellants seek with the aid of the court to redeem the earlier mortgage without paying the subsequent debt. This, it appears to me, would be inequitable. I am of opinion that the decision of the lower court is correct and would dismiss the appeal.

We are asked, however, to allow the plaintiffs appellants to redeem both mortgages and amend their claim for the purpose and thereby save the expenses of a fresh suit. This is not unreasonable and is not objected to by Dr *Satish Chandra Banerji*, the learned advocate for the respondent. With the view of saving the parties costs we accede to this application. It is necessary, therefore, to refer, to the lower appellate court for determination of the following issue —

"What sum, if any, is due by the plaintiffs to the defendants on foot of the mortgage of the year 1874?"

We accordingly refer this issue under the provisions of order XLI, rule 25 of the Code of Civil Procedure, with directions that such relevant evidence as may be required be taken. On return of the finding the usual ten days will be allowed for filing objections.

GRIFFIN, J.—I agree with the learned Chief Justice in the order proposed.

BY THE COURT.—The order will be as stated above.

*Issue re[mitted].*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.*

ISHAR DAS AND OTHERS (DEFENDANTS) *v* KESHAB DEO AND OTHERS (PLAINTIFFS) *

*Civil Procedure Code* (1908) *schedule* II, *section* 1—*Award—Reference by parties interested—Defendant who did not appear not joining—Validity of reference*

A suit was brought against several persons, one of whom was a minor. An official of the court was appointed guardian *ad litem* for the minor defendant, but he did not put in an appearance. The parties, with the exception of the minor applied to the court to refer the matters in dispute to arbitration. The reference was made and an award was given by the arbitrators, whereby the minor was exempted from the plaintiff's claim. Objections were taken to the award, but they were overruled and a decree passed in accordance with the award. *Held* that the minor, not having put in an appearance, nor contested the suit, was not a person interested in the matters which were referred to arbitration, within the meaning of section 1, schedule II of the Code of Civil Procedure, and his not joining in the reference did not invalidate it *Pitam Mal* v. *Sadiq Ali Khan* (1) applied

THIS was a suit for the recovery of money from a firm of which the defendants were stated to be members. There were prior defendants, one of whom, Bhagwan Das, was a minor at the date of the suit. By order of the Court an official of the Court was appointed his guardian *ad litem* ; written statements were filed by the defendants other than Bhagwan Das No appearance was entered on behalf of Bhagwan Das The plaintiffs and the defendants other than Bhagwan Das, applied to the Court to refer the matters in dispute to arbitration An order of reference was accordingly made and an award was given by the arbitrator. Numerous objections were taken to that award in the Court of first instance These objections, one of which was that the reference was invalid by reason of the fact that all the defendants had not joined in it, were overruled by the learned Munsif, who passed a decree in accordance with the award. On appeal the learned District Judge held that no appeal lay. The defendants appealed to the High Court.

Munshi *Gulzari Lal* (with him Babu *Surendra Nath Sen*) for the appellants.

Dr. *Tej Bahadur Sapru*, for the respondents.

---

* Second Appeal No 1221 of 1909, from a decree of D R. Lyle, District Judge of Aligarh dated the 4th of September, 1909, confirming a decree of Aghore Nath Mukerji, Munsif of Kasganj dated the 30th of June, 1909.

(1) (1898) I. L. R., 24 All., 229.

PAGE.

STANLEY, C J, and GRIFFIN, J —The suit out of which this appeal arises was one for recovery of money due from a firm to which the defendants in the suit are said to belong There were four defendants in the suit, one of whom, named Bhagwan Das, was a minor at the date of the suit.

By order of the Court an official of the Court was appointed his guardian *ad litem*, written statements were filed by the defendants other than Bhagwan Das No appearance was entered on behalf of Bhagwan Das The plaintiffs and the defendants other than Bhagwan Das, applied to the Court to refer the matters in dispute to arbitration An order of reference was accordingly made and an award was given by the arbitrator Numerous objections were taken to that award in the court of first instance These objections, one of which was that the reference was invalid by reason of the fact that all the defendants had not joined in it, were overruled by the learned Munsif, who passed a decree in accordance with the award On appeal the District Judge held that no appeal lay.

In second appeal to this Court it is contended that there was no valid reference to arbitration inasmuch as all the parties to the suit had not joined in the reference, and that therefore the award was void *ab initio* and the defendants had a right to appeal The case has been argued at considerable length by the learned vakil for the appellants and the learned advocate for the respondents, numerous authorities have been quoted to us, and the ruling of their Lordships of the Privy Council reported in I L R, 29 Calc, 167, discussed at great length We do not, however, consider it necessary to go into the question dealt with in that appeal in this case In *Pitam Mal* v *Sadiq Ali* (1) it was held by a Bench of this Court that the words "all the parties to a suit" in section 506 of the Code of Civil Procedure referred to the succeeding words of the same section "any matter in difference between them in the suit" and would not necessarily include parties who did not put in any appearance at all, and between whom and the parties to the submission there was not in fact any matter in difference in the suit This decision was passed when the Code of Civil Procedure of 1882 was in force

(1) (1899) I. L. R., 21 All., 229.

Section 506 is to the following effect —"If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may, at any time before judgement is pronounced, apply in person or by their respective pleaders specially authorized in writing in this behalf to the court for an order of reference" There is, as we consider, a significant alteration in the wording of this section as reproduced in the Code now in force Section 1 of the second schedule of the present Code is as follows —"Where in any suit all the parties *interested* agree that any matter in difference between them shall be referred to arbitration, they may at any time before judgement is pronounced, apply to the court for an order of reference" The modification in the law now made in the present Code appears to bear out the interpretation which was put upon section 506 of Act XIV of 1882 by this Court In the present case Bhagwan Das never put in an appearance or contested the suit and in the events which happened he appears to have nothing whatever to do with its result, inasmuch as by the award he was exempted from the plaintiff's claim Under these circumstances the appellant, Bhagwan Das, does not appear to us to be a person interested in the matters which were referred to arbitration between the plaintiffs and the remaining defendants The conclusion at which we have arrived is that the award cannot be challenged by reason of the fact that Bhagwan Das was not a party to the reference We dismiss the appeal with costs.

*Appeal dismissed*

1909

HARGAWAN MAGAN v. BAIJ NATH DAS

the document was executed his mother was in possession and he had a reversionary interest only, contingent on his surviving his mother What he transferred was the chance of an heir apparent succeeding to property within the meaning of clause (a) of section 6 of the Transfer of Property Act Chapter II of that Act relates to transfers of property by acts of parties and sub head (a) refers to "transfers of property whether movable or immovable" It is clear therefore that the clause applies to a transfer of the rights of an expectant heir in movable as well as in immovable property In *Sham Sundar Lal* v *Achhan Kunwar* (1) their Lordships of the Privy Council held that under the Hindu Law a person could not make a disposition of or bind his expectant interest This case has been followed in subsequent cases both by the Calcutta High Court and by this Court, and it has been held in all those cases that the rights of a reversioner cannot be validly transferred The transfer therefore upon which the plaintiff relies is an invalid transfer and had not the effect of conferring upon Musammat Parbati an absolute interest in any part of the promissory notes in question Upon her death the ownership of the promissory notes passed to Baijnath Das and Sheo Das in equal shares, and therefore the appellants were entitled to attach the half share of Sheo Das in execution of the decree held by them The suit of Baijnath Das is consequently untenable and ought to have been dismissed. We allow the appeal, set aside the decree of the court below and dismiss the suit of the plaintiff with costs in both courts

*Appeal allowed.*

(1) (1898) I. L. R. 21 All., 71

1909

NAWAB ALI KHAN v. WAHID ALI.

The Court of Wards, who represented the appellant during his minority, made, on account of maintenance, certain payments to the respondent to which the appellant objected. The Court of the Judicial Commissioner declined to open up that matter in the present suit, holding that "it is not within the province of a Rent Court to determine whether the maintenance was or was not payable"; and their Lordships of the Judicial Committee were of opinion that that was a right decision.

APPEAL from a judgment and decree (27th March 1906) of the Court of the Judicial Commissioner of Oudh, which modified a decree (9th September 1905) of the Court of the Deputy Commissioner of Sitapur.

The main question for determination in this appeal was the true construction of certain rules made by the British Indian Association of Oudh in the year 1869.

The circumstances out of which the appeal arose were as follows:—After the proclamation of the 15th March 1858, which confiscated all proprietary rights in Oudh, the second summary settlement was made with the taluqdars, and taluqa Akbarpur was then settled with one Fazl Ali Khan. The result of the settlement was to confer an absolute proprietary estate on the taluqdar, and therefore to vest in him the interest possessed by persons who previous to the confiscation of Oudh were sharers in the taluqa, or held a village therein, by way of maintenance or otherwise. This hardship was remedied by compromise with the taluqdars, whose association, known as the British Indian Association of Oudh, framed in 1869 rules making provision for the maintenance of persons so affected by a settlement. These rules were sanctioned by Government; claims under them were heard and disposed of by certain members of the association acting as arbitrators; and the awards made by them were given the force of judicial decrees by section 30 of Act I of 1869.

The village of Daryapur, in the taluqa of Akbarpur, had been, prior to confiscation, held in right of maintenance by Mehdi Ali Khan, the brother of Fazl Ali Khan, the taluqdar. In 1869 Mehdi Ali Khan preferred his claims to maintenance to the British Indian Association, who made an award on 25th June 1869, which was accepted on 27th June by a petition of compromise, and was subsequently confirmed by the Financial Commissioner. By that award the village of Daryapur and an allowance of Rs. 700 per annum were granted to Mehdi Ali Khan.

of determining whether there was a mutual, open and current account between the parties of the nature pointed out above; whether the claim for the balance of such an account was or was not time-barred under article 85 of the second schedule to Act No XV of 1877, and whether any and what balance was due to the plaintiffs We accordingly allow the appeal, discharge the decrees of the courts below and remand the case to the court of first instance under order 41, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number in the register and dispose of it on the merits, having regard to the observations made above The parties respectively will abide their own costs of this appeal As to other costs hitherto incurred, the Court in finally deciding the suit will pass proper orders

*Appeal allowed: Cause remanded.*

---

*Before Mr Justice Banerji and Mr. Justice Alston*

HARBANS TIWARI (PLAINTIFF) *v* TOTA SAHU AND OTHERS (DEFENDANTS).*

*Civil Procedure Code* (1882), *sections* 44, 45—*Misjoinder—Pre-emption—Two sales to same vendee—Suit in respect of both sales—Joinder of vendors as defendants*

Of the four owners of undivided shares in immovable property three sold their interest in the property and the fourth sold his interest separately at a later date to the same vendee A pre-emptor sued for pre emption on the basis of both these transactions impleading as defendants the vendors and a rival pre-emptor as well as the vendee *Held* that the suit was not bad for misjoinder of either causes of action or parties. *Bhagwati Prasad Gir* v *Bindeshri Gir* (1) dissented from. *Kalian Singh* v. *Gur Dayal* (2) referred to. *Held* also that the vendor is not a necessary party to a suit for pre emption. *Hira Lal* v. *Ram Jas* (3), *Lok Singh* v *Balwan Singh* (4) and *Ram Sarup* v. *Sital Prasad* (5) referred to

THE facts of the case were briefly as follows:—

Four persons were owners of a certain property. They executed a sale deed thereof, which, however, was registered on behalf of only three of them, as doubts arose whether the fourth,

---

* Second Appeal No 663 of 1908, from a decree of E H. Ashworth, District Judge of Gorakhpur, dated the 11th of April 1908, confirming a decree of Bhawani Chandra Chakarvarty, Subordinate Judge of Gorakhpur, dated the 28th of September, 1907.

(1) (1883) I. L. R., 6 All., 106
(2) (1881) I. L. R., 4 All., 163.
(3) (1883) I. L. R., 6 All., 57.
(4) Weekly Notes, 1903, p. 239.
(5) (1904) I. L. R., 26 All., 549.

Abadi Begam died in February 1902 and was succeeded by her son, the present respondent, and in May 1904 the estate was made over by the Court of Wards to the appellant, who on 19th June 1905 instituted the suit out of which the present appeal arose for arrears of rent of the village of Daryapur from 1309 to 1312 Fasli (21st June 1902 to 17th June 1905).

The claim was made under clause 2 of section 108 of Act XXII of 1886 (The Oudh Rent Act), and the plaint stated that in accordance with the decision of the Court of the Judicial Commissioner of 9th May 1898 and the rules of the British Indian Association the plaintiff was entitled to 25 per cent of the gross rental of the village plus 10 per cent of the Government revenue together with rates and cesses up to the date of Abadi Begam's death, and one half of the gross rental plus 10 per cent. of the Government revenue with the rates and cesses from the date of Abadi Begam's death The total amount claimed was Rs 5,253-13-3.

The defendant pleaded in defence that he was only liable to pay one half the Government revenue plus 10 per cent. thereon as decided by the Court of the Judicial Commissioner on 9th May 1898; and he further claimed to set off against the rent the sum of Rs. 700 per annum awarded as maintenance to Mehdi Ali Khan.

On these pleading issues were framed, of which the three first only are now material:—

"1. For kharif 1309, Fasli, is defendant liable to pay to plaintiff one half the Government revenue for that kist plus local rates and cesses (as defendant alleges), or one quarter of the full rental demand for that kist plus malikana and rates and cesses (as plaintiff alleges)?

"2. From rabi 1309, Fasli to rabi 1312, Fasli, both inclusive (3½ years), is defendant liable to pay to plaintiff only half the Government revenue plus 10 per cent malikana on the whole Government revenue (not on the half) plus local rates and cesses (as defendant alleges), or half the whole rental demand for the 3½ years plus 10 per cent. malikana, plus local rates and cesses, which plaintiff claims to be due under British Indian Association rules, or what?

the respondents, contended that the suit was bad for misjoinder, the vendors might be unnecessary parties, but having been impleaded as defendants, the suit as it stood was open to the objection of misjoinder. It was too late to strike out the names of the vendors after the first hearing; *Abbasi Begam* v. *Imdadi Jan* (1) He further submitted that such causes of action could not be joined together and the suit should be dismissed; *Harbans Singh* v *Lachmina Kuar* (2).

BANERJI, and ALSTON, JJ. —This appeal arises out of a suit for pre emption which has been dismissed on the ground of misjoinder of parties and causes of action. The facts are these:—On the 12th of April, 1906, four persons, *viz*, Rajman Tiwari, Raj Mangal Tiwari, Musammat Gajra and Bechan Tiwari executed a sale deed in favour of the defendant Mohar Ali Khan. When the sale-deed was presented for registration, doubts arose as to whether Bechan was of full age, and therefore it was registered at the instance of Rajman Tiwari, Raj Mangal Tiwari and Musammat Gajra only It was thus a valid sale of the ¾ths share of the property owned by the three persons mentioned above. On the 13th September, 1906, Bechan Tiwari sold to the same vendee the remaining ¼th share. In respect of both these sales the plaintiff, Harbans Tiwari, brought the present suit for pre-emption on the basis of custom, alleging that he was entitled to pre empt the property The defendants to the suit were the four vendors, the vendee, and one Tota, who had brought rival claims for pre-emption in respect of the two sales The vendors did not contest the claim. The vendee denied the existence of the custom alleged by the plaintiff, but at the hearing withdrew that objection and admitted that the custom alleged *by the* plaintiff prevailed. Tota alone seriously contested the claim and he did so on two grounds; (1) that the plaintiff had no preferential right of pre-emption and (2) that there was a misjoinder of parties and causes of action The first plea he abandoned in the court of first instance and admitted that the plaintiff's right was superior to his. It was also admitted that the amount of consideration mentioned in the sale-deeds was the true consideration for

(1) (1895) I. L. R., 18 All., 53. (2) Weekly Notes, 1883, p. 230.

1909

NAWAB ALI KHAN v. WAHID ALI.

dues'. Rent has accordingly been decreed at this rate by the Court below in respect of 1309.

"In respect of the other years the Deputy Commissioner, on his interpretation of the British Indian Association Rules as printed in the case of *Ganga Bakhsh* v. *Dalip Singh* (1), has decreed to the plaintiff only the Government revenue plus local rates and cesses

"In respect of the years 1309 and 1310 the Deputy Commissioner allowed a credit to the defendant of Rs 700 yearly. It appears that under an award of the British Indian Association the plaintiff was liable to pay this amount as *guzara* and the Court of Wards accepted this and deducted the *guzara* from the rent payable.

"In appeal it is contended on behalf of the plaintiff that in respect of 1309 the judgment of this Court of the 9th May 1898, entitled the plaintiff to 25 per cent of the gross rental and that no attention must be paid to the words 'that is to say one half the Government Revenue'

"The contention cannot be accepted The meaning and effect of the judgment of this Court is quite clear and there is no doubt that the Deputy Commissioner has decided rightly according to it

"With regard to the years 1311 and 1312 it is not urged that the Deputy Commissioner has wrongly interpreted the Rules as printed in the Oudh Cases, but it is urged that that translation is in itself incorrect Naturally the Deputy Commissioner accepted that translation, inasmuch as it is stated in the judgment to be correct. But a copy of the Rules in vernacular which was produced by an official of the British Indian Association is on the record of the present case, and according to that copy the translation given in the printed report is not correct The portion which appears to be incorrect was not directly in dispute in that case, and hence perhaps the translation was not scrutinized by this Court.

"The proper translation of the paragraph on page 221" (of the report in 7 Oudh Cases) after the word 'provision' should be as follows —'First, persons whose land was always included in the *taluqa* and who never got separate *kabuliats* This class will remain in possession of what they actually had at annexation rent free during their lives but subject to payment in the second generation of 25 per cent to the taluqdar, in the 3rd 50 per cent , and will not have transferable rights Such persons must pay the Government Revenue plus 10 per cent to the taluqdars and they will have heritable rights'

"It is to be observed that the difference between this translation and that given in the printed report is that the word 'but' is introduced before the words 'second generation', and that the word 'or' printed in capital letters is omitted, as are the words 'and transferable in the second line after the word 'or'.

"The paragraph 'such persons'................'heritable rights' is obscure, and it appears probable that when the office translated it for the purposes of the former appeal the translator, in order to make sense of it, put in the word 'or' which does not exist and the words 'and transferable'.

"In the vernacular we find the words *aur haquq wirasat aur hasil honge* The second *aur* appears to be redundant, but the translator seems to have

(1) (1903) 7 Oudh Cases, 218.

superfluous It was held in *Lal Singh* v *Balwan Singh* (1), following *Hira Lal* v *Ramjas* (2), that in a suit for pre emption the vendor was not a necessary party The same view was held in *Ram Sarup* v *Sital Prasad* (3) Having regard to these authorities, the joinder of the vendors was an unnecessary act on the part of the plaintiff and ought not to have the effect of rendering the suit liable to dismissal on the ground of misjoinder However, this defect, if any, could have been easily cured by striking out from the array of parties the names of the vendors. There was, as we have stated above, no substantial defence to the claim, the plaintiff's right was admitted, and there was no dispute as to the amount of the purchase money It was only on the ground of the alleged defect in the frame of the suit that the claim of the plaintiff was thrown out In our judgment there is no pretence that the adding of the vendors caused any prejudice to any of the parties or any inconvenience to them The vendors did not appear and object to the plaintiff's claim It is they alone who could have pleaded inconvenience, but they did not do so In our judgment the courts below were wrong in holding that the claim was bad for misjoinder of causes of action and of parties There is no other question in the case, and it is clear that if there is no fatal defect in the frame of the suit, the plaintiff is entitled to the decree which he asks for In our opinion there is no such defect We accordingly allow the appeal, set aside the decrees of the courts below, direct that the names of the vendors defendants be removed from the array of parties and decree the plaintiff's claim with costs in all courts We allow the plaintiff three months from this date to pay the purchase money In the event of his failing to pay the purchase money within the time fixed, the suit will stand dismissed with costs in all courts

*Appeal decreed.*

(1) Weekly Notes 1903 p 232. (2) (1893) I L R 6 All., 57
(3) (1904) I L R 26 All., 519

payment of maintenance was not justifiable he may seek in a separate action to recover it from the Court of Wards or from the defendant, but it is not within the province of a Rent Court to determine whether the maintenance was or was not payable

MR. ROSS SCOTT Judicial Commissioner said —

I concur in the judgment of my learned colleague and on the plaintiff's appeal would modify the decree of the Lower Court by substituting Rs 3,188 9-0 for Rs 2 853 9 0 and increasing the costs in that Court in proportion and order that *in the appeal the parties shall bear each other's costs in proportion to the* result In my opinion the Rules of the British Indian Association must be interpreted to mean that persons whose lands were always included in the *taluka* and who never received separate *kabuliats* should pay in the third generation what corresponded to 50 per cent of the rental and that this would be taken to be the amount of the Government Revenue, to which would be added 10 per cent I have nothing to add to the reasons in the judgment of my learned colleague for his decision on the other points raised by the appeal.

ON this appeal

*Ross* for the appellant contended that upon the correct interpretation of the rules of the British Indian Association the appellant was entitled (*a*) to 25 per cent of the *gross rental* for the second half of the year 1309 Fasli; and (*b*) to 50 per cent. of the *gross rental* for the years 1309 to 1312 Fasli; and that the Courts below were wrong in assuming that the rental for the purposes of these rules must be taken to be twice the Government revenue, and in holding that the respondent was only liable to pay for the first period half the Government revenue, and for the second period the whole Government revenue. The words in the last clause of the rule to be construed had been wrongly translated "Government revenue," whereas they really meant "the amount payable to the taluqdar" In that view persons in the second generation and not only those in the third generation were liable to pay the additional 10 per cent.

It was also contended that the appellate Court was in error in holding that they had no power as a Rent Court to decide whether the payments on account of maintenance made by the Court of Wards, and deducted from the rent of the years 1309 and 1310 were justifiable or not The appellant's objection to those payments being so set off ought to have been taken into consideration and allowed by the appellate Court.

*DeGruyther, K. C*, and *S A Kyffin*, for the respondent contended that the Courts in India had correctly construed the

second appeal on the ground that the memorandum of appeal was sufficiently stamped, as the subject matter of the suit being only the equity of redemption which had been sold, the plaintiff was right in paying an *ad valorem* fee with reference to the value which he put upon it

The appeal first came up before RICHARDS and ALSTON, JJ, who, on account of the importance of the question raised, recommended that it should be laid before a larger Bench, which was accordingly done

Babu *Peary Lal Banerji*, (with him Dr *Satish Chandra Banerji*) for the appellant, contended that this suit differed essentially from that class of pre emption suits in which the pre emptor in seeking to enforce his right of pre-emption, sued for possession of the land itself Here the pre emptor only wanted to be substituted for the vendee, who held the equity of redemption

The Legislature when it enacted the Court Fees Act, VII of 1870, only contemplated suits for pre emption in which the pre emptor claimed possession of the land itself Provision was made in this Act only for such suits as had been provided for in the Limitation Act In the Limitation Act, IX of 1871, article 10, and Act XIV of 1859 section 1, clause (1), the Legislature only contemplated suits for pre emption where the "purchaser at the sale sought to be impeached takes actual possession" It was not till the year 1877 that the Legislature, by Act XV of 1877, provided for suits for pre emption, "where the subject of the sale does not admit of physical possession" It was thus clear that this particular class of suits was not in the contemplation of the Legislature when the Court Fees Act was enacted and that therefore there was no direct provision for it

Moreover, section 7, paragraph (vi), of Act VII of 1870 did not enact that, irrespective of the nature of the interest in the land claimed, in all cases court fees should be calculated upon the value of the land itself where the right of pre emption was claimed in respect of an "interest in the land" only Court fees should be levied upon the value of that "interest" and not upon the value of the land itself The value would only be required to be computed in accordance with paragraph (v) when

September, 1867 Under it "the taluqdars agree to make the following provisions for the maintenance of their relatives provided that their doing so be sanctioned by the Government and be considered as a final disposal of the question in the classes of cases detailed below" The Officiating Chief Commissioner at Fyzabad dealing with its terms states "I think they are in every way as liberal as we could expect to obtain for the relatives of the taluqdar" It is plain that the settlement of the very important questions of the title to and interest in the land of this portion of India was thus put upon a substantial and permanent foundation, and the decision of the questions in this case, involving a *construction of this portion of these Rules of Practice* framed by the British Indian Association, has been represented to their Lordships as of general importance The provision for maintenance, which it is agreed by the parties applies and falls to be construed, is in the language of the translation, as follows —

This class will remain in possession of what they actually had at annexation rent free during their life-time but subject to payment in the second generation of 25 per cent to the taluqdar and in the third 50 per cent and will not have transferable rights If such persons pay the Government Revenue plus 10 per cent to the taluqdar they will have heritable rights in addition.

It is of course, fundamental to ascertain what is the bulk sum out of which these percentages are to be struck The Government Revenue is 50 per cent of such bulk sum For this and its regular payment the taluqdar is responsible The Government valuation is made at intervals of thirty years and is struck, not, of course, upon the actual receipts for a particular year, but upon an assumed rental which represents the fair average of the *taluqdar's annual receipts* A *fixed datum is thus* arrived at for the payment of Government Revenue From the documents produced in this case it is manifest that the actual receipts of rental vary greatly from year to year, and that, were the Government Revenue to be fixed upon this varying basis, the greatest difficulties would emerge in administration And, so far as the taluqdars are concerned, it appears to be much in their interest that the charges upon their property should be upon a fixed basis

to all "suits to enforce pre emption" There was no provision in the Act for the calculation of court fees as suggested by the appellant, therefore the court fee should be calculated as laid down in section 7, paragraph (vi) on the value of the land computed in accordance with paragraph (v) of the same section There was absolutely no justification for the addition of such words as "interest in" to qualify "land" The words "market value" in section 7, paragraph (v) (*d*), meant the value of the land itself, irrespective of any incumbrance that might be on it In a suit for possession of land, if it is incumbered, the amount of the mortgage will be taken into consideration, but the land itself will be valued in accordance with section 7, paragraph (v), and court fees paid on it Moreover, if the appellants' contention be correct, the Court would have to investigate for purposes of court fee whether any land, possession of which was claimed, was really mortgaged, and if so, what the amount due upon it was If a person in possession of property which was heavily incumbered was ousted by a trespasser and it appeared that the amount due upon the incumbrances was more than the value of the property itself, it could not be suggested that no court fees ought to be paid The valuation for purposes of court fees and for purposes of jurisdiction should not be confounded He cited *Hafiz Ahmed* v *Sobha Ram* (1)

Babu *Peary Lal Banerji* replied

KNOX, ACTING C J, and RICHARDS and ALSTON, JJ —The question which has been referred to this Bench is "what is the proper Court fee in a pre emption suit, when the property in respect of which pre-emption is claimed is already subject to a usufructuary mortgage which the pre emptor does not seek to disturb"

The material facts are shortly as follows The plaintiff claimed to pre empt a sale of the equity of redemption in certain property The sale was made on the 3rd December, 1906, by the defendants 1 and 2 to the other defendants The sale consideration as stated in the deed was Rs 20,000 but the plaintiff alleged that the real consideration was Rs 5,000 The property was mortgaged in 1877 by way of usufructuary mortgage, to

(1) (1884) I L R, 6 All, 498

Certain contentions were put forward as to an alleged mistranslation of one clause in the Rule. That clause reads:—

If such persons pay the Government revenue, plus 10 per cent. to the talukdar, they will have heritable rights in addition.

It is said that the words translated "Government revenue" really mean any payment to a superior, such as the taluqdar and that accordingly the translation should read: "If such persons pay (not the "Government revenue," but) the amount due to the taluqdar, plus 10 per cent. to the taluqdar, they will have heritable rights." It is somewhat difficult to follow such an argument, and the proposed correction would appear to confuse, rather than to clarify, the clause But it is not necessary, in their Lordships' opinion, to make any separate pronouncement on that subject The basis of the Rule would, in any view, fall to be arrived at; and their Lordships have little doubt that the assumed rental which is used in fact for the Government purpose is, by the Rule, meant to be used for maintenance purposes.

The Court below—viz., the Court of the Judicial Commissioner of Oudh—has pronounced a decree upon this footing, and their Lordships are of opinion that the decree is sound.

Their Lordships do not think that the claim of the taluqdar for a contribution of 25 per cent. and 50 per cent respectively of the rents demanded for the years in question (plus 10 per cent. in the sense of the Rule) can be sustained. Payments on this scale might conceivably far exceed, not only the Government revenue but the entire receipts of rental actually obtained for particular years. The rights of the relatives in possession as sub-proprietors might thus be reduced to a shadow, and the provisions for these large classes of society rendered precarious.

A construction which would bring about such a result is not, in their Lordships' opinion, warranted on a sound reading of the terms of the maintenance provision.

Another point was argued. It appears that the appellant, who during his minority was represented by the Court of Wards, objects to certain payments made by that Court on account of maintenance to the respondent. Their Lordships agree with the view taken by the Judicial Commissioner in his judgment of the 27th March, 1906, that these transactions cannot be opened up

Court felt the difficulty of charging the plaintiff the same court fee when merely seeking to evict the tenant as would be charged if full proprietary right was claimed. An amendment has been introduced by Act V of 1905 providing expressly for cases in which a landlord seeks to recover possession from the tenant, and the court fee payable has been greatly reduced, but so far as suits for pre-emption are concerned we still must look to the provisions of section 7, paragraph (vi), of the Court Fees Act, in answering the present question, "what is the proper fee?" No doubt, if any ambiguity exists, the Act should be read most favourably to the suitor. The question is:—Is there any ambiguity? Section 7, paragraph (vi) deals with suits to enforce a right of pre-emption. It clearly and expressly says that the court fee is to be "according to the value of the land, house or garden, in respect of which the right is claimed." It does not say that the court fee is to be according to the value of the interest in the property pre-empted. It is to be according to the value of the land "in respect of which the right is claimed." In the present case the right of pre-emption is claimed unquestionably in respect of the entire land, subject though it be to the mortgage of 1877. Paragraph (vi) goes on to say that the value of such land, house or garden is to be computed in the manner provided by paragraph (v). It is said that this operates very hardly upon the present plaintiff. This is no doubt true, but it seems to us that the hardship in his case is no greater than the hardship to a plaintiff who seeks to recover possession of immovable property subject to incumbrances. Take, for example, a suit between two persons, rival claimants to the estate of a deceased owner, the property being subject to incumbrances which both parties admit to be due and binding upon them. It has not been contended that in such a suit, the plaintiff would not be obliged to pay a court fee on the value of the land without any allowance or credit being given for the incumbrances. It may be that there is reason for amendment of the Court Fees Act. We think that provisions of the Act are free from all doubt and ambiguity and that the court fee must be assessed according to the provisions of section 7, paragraph (vi), upon the value of the property, computed in accordance with section 7, paragraph (v).

*Quære* whether the existence of such a system formed a ground for not drawing the ordinary presumption to the detriment of the plaintiff from his failure to go into the witness box and support his case *Semble* It does not.

1909

LAL KUNWAR v. CHIRANJI LAL.

APPEAL from a judgment and decree (23rd November 1905) of the High Court at Allahabad, which reversed a judgment and decree (19th August 1904) of the Subordinate Judge of Aligarh.

The main question for determination in this appeal was whether the respondent, the plaintiff in the suit out of which the appeal arose, was the adopted son of one Brij Lal.

The facts of the case are sufficiently stated in the judgment of their Lordships in this appeal. The Courts in India differed, the Subordinate Judge finding on the evidence that the plaintiff had failed to prove his adoption and dismissing the suit.

The High Court (SIR JOHN STANLEY, C J, and MR. JUSTICE BANERJI) held the plaintiff's adoption proved

On this appeal.

*H. Cowell* and *B Dube* for the appellant contended that the High Court was wrong in holding that the adoption had been established. It was amply proved by the evidence on the record that the respondent had never been adopted by Brij Lal. The respondent's claim to have been so adopted was opposed to all the probabilities of the case and the conduct of the parties, and that of the respondent's father Ram Lal, and his father in-law. The books of account in which the entries concerning the fact of the ceremony and the expenses of the adoption were said to have been made were not produced, and the finding of the High Court that the books "found their way into the possession of Tej Ram" (the brother of Brij Lal) "and might have been produced by the defendant" was merely conjecture, and unsupported by any evidence; but, on the contrary, was opposed to the evidence in the case. If the respondent's case was true, the suit might have been brought long before it was actually instituted, as the adoption was alleged to have taken place in 1889 The respondent moreover was not called as a witness to support the case he put forward Reference was made to *Kishori Lal* v. *Chunni Lal* (1); Civil Procedure Code (Act XIV of 1882),

(1) (1908) I. L. R., 31 All., 116; L. R., 36 I. A., 9.

minor; that there was no hypothecation of the shop in favour of the plaintiffs, nor was there a charge on it; that she took no money from the plaintiffs, nor did Hulaso take any money for her benefit, and that she was in possession by right of inheritance from her husband. Upon these pleadings, the court of first instance granted a personal decree to the plaintiffs against the defendants It held the mortgage of 1903 proved and that Rs. 231 had been paid to the mortgagees, and that Rs. 100 had been taken by the defendants "for domestic expenses and for funeral ceremonies of Bhagwan Das and Chhote Lal." Ram Piari alone appealed to the District Judge and the plaintiffs filed cross-objections. The lower appellate court, without going into other questions, held that the contract, being that of a minor, was void. It accordingly dismissed the suit. The plaintiffs appealed. The case came before Banerji, J., who disposed of it by the following judgment:—

"The suit which has given rise to this appeal was brought by the appellants to recover Rs. 346-1 from the defendants and for sale of a shop alleged to be the property of the defendants. The facts are these. The said shop belonged to two brothers, Bhagwan Das and Chhote Lal, who mortgaged it to Matru Mal and Basdeo in 1903. They died leaving them surviving Musammat Hulaso, their mother, Musammat Ram Piari, widow of Chhote Lal, and Musammat Goma, daughter of Bhagwan Das. On the 20th of September, 1905, a sale-deed is alleged to have been executed in favour of the plaintiffs in respect of the said shop for a consideration of Rs 600 by Hulaso and Ram Piari. It has been found that Ram Piari was a minor at the date of the sale and is still a minor. The Sub-Registrar before whom the sale-deed was presented for registration, being also of opinion that Ram Piari was a minor, refused to register it as a document executed by her. The plaintiffs say that out of the amount of consideration for the sale they paid Rs 100 in cash and Rs. 231 in discharge of the mortgage held by Matru Mal and Basdeo, and they seek to recover the said sums with interest not only from the defendants personally but also by sale of the shop. The court of first instance refused to order a sale of the *shop*, but made a personal decree against the defendants. From this decree Ram Piari appealed and the plaintiffs filed objections under section 561 of the Code of Civil Procedure. The lower appellate court dismissed the objections, decreed the appeal, and dismissed the suit as against Ram Piari on the ground that, as Ram Piari was a minor, the sale by her was absolutely void and that the plaintiffs could not recover the amount paid by them. Against this decree of the court below the present appeal has been preferred. As regards the Rs. 231 alleged to have been paid in discharge of the mortgage held by Matru Mal and Basdeo, I think the plaintiffs have no right of action. As the sale to them by Ram Piari was a sale by a minor, it was void, as held by their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmo Das Ghose* (1) As they did not acquire any interest in the property, they had no interest to

(1) (1902) I. L. R., 30 Calc., 539.

*Jaganath Pershad* v *Hanuman Pershad* (1) as to the two Courts in India differing on facts, and *Kissorimohun Roy* v. *Harsukh Das* (2) was also referred to

*Cowell* replied

1909, *December* 16*th* —The judgment of their Lordships was delivered by LORD ATKINSON —

This is an appeal from a judgment and decree of the High Court of Judicature for the North Western Provinces, Allahabad, dated the 23rd November 1905 which reversed the judgment and decree of the Subordinate Judge of Aligarh, dated the 19th August 1904, on a pure issue of fact

That issue of fact is whether one Brij Lal, deceased husband of Musammat Dhan Kunwar, now also deceased adopted Chiranji Lal, the plaintiff and respondent, the son of one Ram Lal

Tej Ram, the brother of Brij Lal survived his brother Brij Lal for about eight and a half years, and died on the 21st June 1898, leaving two widows him surviving, the senior of whom died on the 24th February, 1899, leaving her surviving Musammat Lal Kunwar, who is the defendant in the suit and the appellant in this appeal

The suit was instituted on the 22nd August 1903 by the plaintiff, *in formâ pauperis* though his natural father is possessed of some means against the appellant, Musammat Lal Kunwar, and Musammat Dhan Kunwar who died pending the appeal, and the property in dispute is not inconsiderable

The plaintiff alleges that the brothers, Tej Ram and Brij Lal, were separated in ownership of this property, and, as the adopted son of Brij Lal he claims to recover the whole of the property mentioned in the plaint or in the alternative, if their ownership is joint to recover one half of that property Both defendants contested the suit and pleaded, amongst other things, that the plaintiff was not the adopted son of Brij Lal, and that the two brothers were members of a joint Hindu family

Brij Lal, his brother Tej Ram, and Ram Lal, the father of the plaintiff are all Bohra Brahmins, which, it is alleged, merely means that they belong to the Bohra tribe, or brotherhood, whose members follow the business of money lending an astute class,

(1) (1909) I L R 36 Calc 633 L R 36 I A 221

(2) (1889) I L R 17 Calc 436 L R 17 I A, 17

p 922, 923. The Madras High Court has applied this doctrine and granted relief to a person who went into possession of property purchased by him, and paid off an incumbrance, though the purchase subsequently turned out to be invalid; *Chama Swami* v *Padala Anandu* (1) The fact that the plaintiff there had temporarily obtained possession does not alter the principle It is also submitted that section 70, Indian Contract Act, fully covers the case. Under this section no previous request or assent on the part of the party on whom the benefit is conferred need be proved. The section is directed against an officious interference with another man's property All that is necessary is that the benefit should have been enjoyed and the act must have been *lawfully* done, *Damodara Mudaliar* v *Secretary of State for India* (2) The meaning of *lawfully* is that the thing done should not serve an illegal end Section 23, Indian Contract Act, may throw some light on the meaning of the word.

There is no rule of law which prohibits the payment of a debt which a minor is bound to pay The plaintiff's act therefore was *lawful*; *Desai Himatsingji Joravarsingji* v *Bhavabhai Kayabhai* (3) It is submitted that the section is applicable to a minor as much as to an adult Both Pollock and Whitley Stokes are of that opinion, Pollock and Mulla, *Indian Contract Act,* 1st Ed, 246. The appellants are therefore entitled to compensation. As to the Rs 100, the findings of the first court show that they were expenses incurred for necessaries, and under section 68, Indian Contract Act, they are recoverable from the property of the minor

Munshi *Gulzari Lal,* for the respondent The Privy Council having held that a minor's contract is void, it must be conceded that the appellants acquired no interest in the property under the sale-deed, and so they cannot recover moneys paid in reliance upon such sale, *Mohori Bibee* v *Dharmodas Ghose* (4) In order that the appellants may be entitled to the right of subrogation there must be a distinct agreement with the debtor for that purpose; Ghose, *Law of Mortgage*, 3rd Ed, p 402 In the present case there is no such agreement The case in I. L R, 31 Mad, 439 is distinguishable The vendee there got into possession of the property and had an interest to protect. Section 70, Indian

(1) (1908) I. L. R., 31 Mad., 439 (2) (1894) I. L. R., 19 Mad., 89, 91. (3) (1880) I. L. R., 4 Bom., 643 653. (4) (1903) I. L. R., 30 Calc., 539, 549.

1909

LAL KUNWAR v. CHIRANJI LAL

detriment of a plaintiff who, under similar circumstances, failed to enter the witness box and face the ordeal of cross examination, ought not to be drawn in cases between natives tried in India, because of a species of advocacy tolerated by the Courts of Law in that country, in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client in order that he himself may have the opportunity of cross examining that client The result is that, should the opponent refuse to be led into this trap, the parties (the principal witnesses, who possibly could throw light on all those tangled transactions which so perplex those who have to decide these cases) are never examined at all, and the litigation goes forward through tortuous windings to its unsatisfactory and uncertain end This case is a good example of this practice, for not only was the plaintiff not examined on his own behalf, but the defendant, Musammat Dhan Kunwar, was not examined on her own behalf either It is a vicious practice, unworthy of a high-toned or reputable system of advocacy. It must embarrass and perplex judicial investigation, and, it is to be feared, too often enables fraud, falsehood or chicane to baffle justice The circumstances under which Musammat Dhan Kunwar, who is a *parda-nashin* woman and illiterate, was examined by the Subordinate Judge are instructive.

After the death of Brij Lal, on the 3rd February, 1890, his surviving brother, Tej Ram, applied to the Assistant Collector for a mutation of names for the village formerly enjoyed by Brij Lal, and also made an application to the District Judge of Aligarh for a certificate for the collection of debts on the ground that the property enjoyed by both was joint property. Musammat Dhan Kunwar resolved to oppose these applications, and on the 24th March, 1890, executed a power of attorney in favour of Ram Lal, authorizing him, amongst other things, to file an application for the mutation of names in respect of ' the ancestral property, the estate of my husband, in order to get my name entered in respect thereof ", and also to obtain from the District Judge a certificate in her favour for the collection of the debts due to her husband There is no mention whatever of the plaintiff or any right belonging to him, or any reference whatever to the alleged adoption in this lengthy document, but when the

himself a creditor of the latter, Anson, *Law of Contract*, 8th (American) ed, 442, 443

The following cases were also referred to *Dakhina Mohan Roy* v *Saroda Mohan Roy* (1), *Peruvian Guano Co.* v. *Dreyfus Brothers* (2) and *Seth Chitor Mal* v *Shib Lal* (3)

KNOX, ACTING C J AND RICHARDS, J —After carefully listening to the very able and elaborate arguments addressed to us on behalf of the appellants, we are of opinion that the judgment delivered by our brother BANERJI is a judgment in accordance with the law as prevailing and as understood in these Provinces We therefore are not prepared to interfere We dismiss the appeal with costs

*Appeal dismissed*

## REVISIONAL CRIMINAL.

*Before Mr Justice Richards and Mr Justice Alston*

EMPEROR *v* ABDUL RAHMAN AND OTHERS *

*Criminal Procedure Code sections* 157, 159 476—*Police report by Sub Inspector —Further investigation by Superintendent—Subsequent inquiry by Magistrate—Order for prosecution of witnesses examined in the Magistrate's inquiry—Act No XLV of* 1860 *(Indian Penal Code), section* 193

On the strength of a police report the District Magistrate ordered the Superintendent of Police to investigate a certain case The Superintendent made an investigation and came to the conclusion that the case was not a true one but at the same time suggested that a magistrate might be sent to inquire into it The District Magistrate accordingly deputed a magistrate of the first class to inquire He made an inquiry which resulted in an order for the prosecution of certain witnesses who had given evidence before him. *Held* that there was no legal authority for the inquiry held by the Magistrate and his order for the prosecution of the witnesses was therefore invalid *In the matter of the petition of Kandhaiya Lal* (4) and *Mouli Dar* v *Nauranji Lal* (5) referred to

THE facts of the case are fully stated in the judgment of the court

Babu *Satya Chandra Mukerji*, for the applicants

Mr *R Malcomson* (Assistant Government Advocate), for the Crown

* Criminal Revision No 11 of 1909 from an order of L. Marshall Sessions Judge of Mainpuri dated the 8th of June 1909

(1) (1893) I L. R. 21 Calc 142.
(2) [1892] A. C., 16
(3) (1892) I L. R 14 All 273
(4) Weekly Notes 1899 p 67
(5) (1900) 4 C W. N., 351.

1909

LAL KUNWAR v. CHIRANJI LAL

This lady was cross examined by the plaintiff's pleader, but not a question was put to her relative to the account books, which are referred to in her deposition of the 6th May, 1890, in these words —

No account books of Brij Lal are with me They must be in my sitting room. I have not gone to the sitting room since my husband's death I am not literate. I lived in the house of Ram Lal for 6 or 7 days because my jeth Tej Ram quarrelled with me about this

And no application appears to have been made to recall Ram Lal, or to examine the plaintiff, then about 16 years of age or his mother, if she were alive, to refute the serious charge thus made against them, the charge, in effect, of entering into a conspiracy to procure the commission of perjury for the plaintiff's gain The history of the account books is most remarkable Ram Lal and many other witnesses describe in minute detail the recording of the fact of adoption as well as of the receipts of presents in them Ram Lal further stated at the trial that "the assets of Brij Lal, such as goods, papers and ornaments were with Musammat Dhan Kunwar," and that he employed a pleader for her in the mutation proceedings, but not a question was put to him as to why at the time when he was managing the suit and putting forward the claim of his son for the first time, he did not search for, examine, or produce the books which, if there be a particle of truth in the whole story told by him and his witnesses, would have terminated the controversy then as now in his son's favour Dhan Kunwar was not then hostile to his son's claim On the contrary, it is alleged that it was at her request and by her insistence, that it was put forward Ram Lal is a hereditary money lender like all his tribe He must be well accustomed to keep books, and know the value of written documents The pleader he then employed must if the story now told had been detailed to him, have seen the capital importance of the production of these books Yet he appears never to have asked Dhan Kunwar a single question concerning them The admission above mentioned of the lady that they were in her sitting room was extracted from her on cross examination by the pleader for Tej Ram, her opponent, the man who is sworn by Ram Lal to have been present at the ceremony, and to have signed the entry in the book recording the adoption No effort was shown to

District Magistrate accepted this suggestion, but being of opinion that the Deputy Magistrate who had held the inquiry was the proper person to take action under section 476 of the Criminal Procedure Code, he directed him to do so

The Deputy Magistrate thereupon proceeded to make the orders complained of, presumably acting under section 476. The question we have to consider is, under what section of the Code or other legal sanction did the Deputy Magistrate hold his inquiry It is clear that he did not act under an order passed by virtue of the powers given by section 202 of the Code The Assistant Government Advocate has argued that the inquiry was held under section 159 of the Code That section provides that when a Magistrate receives a report such as is mentioned in section 157, he may direct an investigation, or if he thinks fit, at once proceed or depute a subordinate magistrate to hold a preliminary inquiry into the case

It is contended on behalf of the petitioners that proceedings can only be taken under section 159 when the order is based upon the report referred to in section 157 It is further contended that section 159 gives an alternative procedure only, and that as the District Magistrate had already directed an investigation by the Superintendent of Police, he could not subsequently direct an inquiry by a Magistrate As to the first point, it is clear that the order to the Deputy Magistrate was passed after the Superintendent of Police had been directed to investigate It was not until the report upon that investigation had been submitted that the Deputy Magistrate was directed to hold an inquiry This being so, the case is very similar to that of *Kandhaiya Lal* (1) It was held in that case by STRACHEY, C J, that a Magistrate could only hold an inquiry under section 159, when the order directing it was passed in consequence of a report submitted under section 157, which report precedes an investigation A similar view was taken by a Bench of the Calcutta High Court in the case of *Mouli Dirzi* v *Naurangi Lal* (2) We think that we ought not to disregard these cases In this view the orders now before us in revision were passed without jurisdiction The Sessions Judge does not appear to have realized the difficulties of the case, though

(1) Weekly Notes 1899 p 67 (2) (1900) 4 C W N 251

1909

LAL KUNWAR v. CHIRANJI LAL.

1891 On the 29th September, ten days after, the summons was issued in the suit, then entitled Ram Lal, *plaintiff* v Musammat Dhan Kunwar, widow and Chiranji L l, minor under the guardianship of his mother, Musammat Dhan Kunwar, residents of Jatari, *defendants*, from which it appears that the suit was brought to recover a sum of Rs 1 092 6 11, but in respect of what cause of action is not stated

The further proceedings in the case are not printed in this record, but it would appear from an order dated the 15th October, 1898 (four months after Tej Ram's death), made by the Subordinate Judge of Aligarh in the original suit (158 of 1891) already mentioned, that a decree for the sum sued for had been obtained against the defendants, who are described as judgment debtors, Ram Lal being described as decree holder, that some objection had been made by the judgment debtors, that it was such an objection as in the opinion of the Judge should not be made by the judgment debtors, and gave rise to the suspicion that there was collusion between the objector and the judgment debtors Who the objector was does not appear, but the same Subordinate Judge in his judgment delivered on the 17th November, 1902, in a suit instituted by Dhan Kunwar against Lal Kunwar, states that, after Tej Ram's death, Ram Lal obtained a decree in this suit and applied to attach under it a certain door frame and door leaves of a house, alleging them to be the property of her son (the plaintiff) in virtue of the alleged adoption Dhan Kunwar was never asked a question about these proceedings when produced in the present trial At the end of her cross examination by the plaintiff's pleader, the plaintiff himself was invited by the Subordinate Judge to ask her any questions he might desire to ask, when he replied "Sufficient questions have already been asked" The only account given of this litigation by Ram Lal himself is that he instituted the suit for profits due to himself, that he was a co sharer in the property, and paid Rs 3,000 a year as revenue, but it is evident that, while Dhan Kunwar enjoyed the property of her late husband in virtue of her right as his widow, she ought to have paid the appropriate share of the revenue, and the plaintiff incurred no personal responsibility for it The introduction of

Prasad on May 31st, 1866, and sold the mortgagee rights in the remaining 10 biswas to them On Musammat Jamna's death, Musammat Janki, her daughter, sold the sub mortgaged 10 biswas to Gulab Rai and Debi Prasad on April 29th, 1867 Debi Prasad again sold his half share to Gulab Rai on May 8th, 1868 Gulab Rai was a member of a partnership business of which Mannu Lal, the father of Soni Ram, plaintiff, was a member, and these mortgagee rights were acquired by the former on behalf of the partnership At a partition between Gulab Rai and Mannu Lal the mortgagee rights in the village in question fell to the share of Mannu Lal Out of the 20 biswas some of the mortgagors redeemed 6 biswas and 17½ biswansis, and Mannu Lal him elf acquired the equity of redemption of the balance by purchase at auction In 1898 Musammat Janki died, and on October 12th, 1904, the defendant brought a suit for cancellation of the deeds executed by their grandmother and their mother respectively and for possession of the property, and they succeeded in that litigation It was alleged by the plaintiff that he had several times offered to redeem the property, but the defendants did not show any inclination to accept the mortgage money Hence this suit

It appears that after the mortgage the two ladies who had successively come into possession of the aforesaid property acknowledged the mortgage in the following four documents —

1 Mortgage deed, dated November 12th, 1865
2. Sale deed, dated May 31st, 1866
3 Hypothecation bond, dated May 31st, 1866
4 Sale deed, dated April 29th, 1867.

These documents bore the signatures of the ladies 'by the pen of' their agents

The defendants contended, *inter alia*, that the suit was barred by limitation, and by the provisions of sections 13 and 43 of the Code of Civil Procedure, 1882 They insisted that the suit having been instituted when Act XV of 1877 was in force, should be governed by that Act, and that the acknowledgments relied upon would not save the operation of limitation inasmuch as they had not been made by the person through whom they (the defendants) derived title or liability

ceremony and the receipt of the presents were recorded in two books or only in one, and such like In the High Court much comment was directed to the question of the relative credibility of a Bohra money lender who had amassed many tens of thousands of rupees in his business, and of a Bohra money lender who in the same business had not been so fortunate, as if there were some fixed relation between the gains of usury and truth Due weight, however does not appear to have been given to the conduct of the plaintiff, the improbability and inconsistency of the story told on his behalf, his absence from the witness chair; and the non production of all books or documents The conduct of the trial was, on the whole, eminently unsatisfactory The Subordinate Judge decided, as a fact on the evidence before him, that the plaintiff had not been adopted The High Court, on the same evidence, decided that he had been adopted Their Lordships do not accept either of these conclusions It appears to them that the sounder view lies between these two extremes The burden of proving that the alleged adoption took place 20 years before the trial rested upon the plaintiff They are clearly of opinion that he has failed to discharge it

The Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside with costs and the decree of the Subordinate Judge dismissing the action restored

The respondent will pay the costs of the appeal

*Appeal allowed.*

Solicitors for the appellant —*Ranken Ford, Ford and Chester*

Solicitors for the respondent —*Barrow Rogers and Nevill*

J V W

No XIV of 1859 was in operation. Consequently they were *acts done* under that law and according to section 6 of the General Clauses Act, 1868, the former Act will govern the suit The words "act done" used in section 6 are quite general, and will apply to any act whatever done when that Act was in force. In 1877 the General Clauses Act, 1868, was in force. To interpret "act done" as "act done under a particular act" will lead to reading into the section words which are not there Moreover, in the next sentence "offence committed" shows that that was not the intention of the Legislature, for no offence can be committed with the sanction of or under any law or Act. Act No XIV of 1859 allowed 60 years from the date of the acknowledgment, and so did Act IX of 1871 The period was not curtailed by No. Act XV of 1877, only the qualification as to acknowledgment was omitted, a new section therefor having been enacted. It is submitted, therefore, that the acknowledgments and the effect thereof are governed by Act No XIV of 1859, *Umesh Chunder Das* v *Chunchun Ojha* (1) Assuming that Act No XV of 1877 does apply, it will have to be seen what is the meaning of the expression "through whom he derives title," and for that purpose reference will have to be made to Acts in which the same or a similar expression has been used Now, under section 13 of Act No XIV of 1882, the expression was "through whom he claims," and it has been held that a reversioner *claims through* the life tenant, *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (2), *Lachhan Kunwar* v. *Manorath Ram* (3) Again at p 44 of *Bhagwanta* v. *Sukhi* (4) it has been observed by STRACHEY, C J, that as the Hindu widow fully represents the whole estate, a bar of limitation, effective against her, will also stand in the way of the reversioner. The law is also stated in the same terms in English text-books on the Statutes of Limitation. Darby and Bosanquet *Limitation*, 2nd Ed, 232 Lightwood: *Time Limit of Actions*, 337 If the mortgagors had redeemed the property from the widows, the reversioners could not have pleaded that their act would not bind them. It, therefore, does not stand to reason that an act of the widows which had the effect of extending the period of

(1) (1887) I L. R. 15 Calc, 357, 362
(2) (1893) I. L. R, 21 Calc, 8
(3) (1894) I L R, 22 Calc, 445, 450.
(4) (1899) I. L R, 22 All, 33.

liable There was no doubt that it was the lambardar who should be looked to for payment of Government revenue, but that did not preclude the revenue authorities from proceeding against the persons liable, even though they were not lambardars Suppose there was a case in which the Penal Code provided that either a summons or a warrant might issue In such a case, if a warrant were first issued, it could not be said that the warrant was illegal and the man arrested could escape from custody

Babu *Satya Chandra Mukerji*, for the accused, submitted that they were returning from the Tahsil only after paying the Government revenue when they were arrested under the orders of the Tahsildar Under such circumstances, the process was not legal The Board's Circular was that process should be issued against the lambardar Before a warrant could be issued, a writ of demand must be issued under section 147 of the Land Revenue Act calling upon the defaulter to pay The Legislature had advisedly put a writ of demand first, then arrest of the defaulter and then sale of his property

It was therefore submitted (1) that the process ought to have been issued against the lambardar in the first instance and (2) that as the warrant was an illegal warrant the custody was not legal Moreover, the case was a petty case and the appeal by Government was unreasonable

KNOX and KARAMAT HUSAIN, JJ —Gulab Singh, Bishnath Singh, Chatar Singh and Baldeo Singh are accused of an offence under section 225B of the Indian Penal Code On the 19th of March these four men were arrested and locked up in the tahsil lock up A warrant against them had been issued by the Tahsildar on the ground that they were defaulters and had not paid the Government revenue due from them On the 20th, these four men escaped whilst still in custody *There is no dispute about the facts* All the necessary ingredients constituting the offence have been admitted by the accused or on their behalf The learned gentleman who appeared on their behalf in the court below contended that even on the face of the admitted facts the accused were not liable to any punishment He based his argument upon rule 9, clause (2), of the rules of the Board of Revenue relating to recovery of arrears

particular thing, the rights and duties created by that Act shall be subject to it Further, "anything done" in section 6 of the General Clauses Act of 1868, mean, "done in pursuance of or under colour of an Act" The right which was given by the acknowledgments was to take advantage of the repealed statute and it is not a "right accrued" within the meaning of the usual saving clause, *Abbott* v *The Minister for Lands* (1) The effect of the repeal is as if the repealed statute had never existed, Beal *Cardinal Rules of Legal Interpretation*, 2nd Ed, 459 There is no analogy between section 13 of the Code of Civil Procedure and section 19 of the Limitation Act The words of the two sections differ, and none of the cases cited have considered the meaning of the expression used in the Limitation Act The principle of the cases under section 13, is that where there is a person who for the time being represents the full estate, and there is litigation as to that estate, the estate becomes impressed with a character which it does not subsequently lose This results from the act of the court, but an acknowledgment is an Act of the parties It has been held that a compromise arrived at with the widow in a litigation, even if fair, is not binding on the reversioner, *Gobind Krishna Narain* v *Khunni Lal* (2) The cases relating to fusion of interests giving an extension of time are no longer law Lightwood *Time Limit of Actions*, 90, *Browne* v *The Bishop of Cork* (3) Assuming again that there was fusion of interests, there must be one of two things, namely, either the right was suspended during 1883 to 1898 or article 148 does not apply but article 120 does There is no warrant for the exclusion of time in the Indian Limitation Act It is a self-contained Act, and the law in India must be found within the four corners of that Act Article 120 will not apply inasmuch as there is a special article (article 148) which applies The respondent's predecessor had acquired only a widow's life-interest, so there was not even a complete fusion The relinquishment contended for by the appellant can apply to a plaintiff only The appellants are defendants

BANERJI, and TUDBALL, JJ —This appeal arises out of a suit for the redemption of a usufructuary mortgage dated the 2nd of

(1) [1903] A C 425 (2) (1907) I L R 29 All, 487, 192
(3) (1853) 1 Dr. and War 700 s c 56 R R 223.

1909

EMPEROR v. GULAB SINGH.

would use ordinary prudence if he had resort to arrest instead of serving a writ of demand.

For a defaulter to escape from a custody in which he has been locked and detained is not a very grievous offence; still it is an offence in which the authority of the officer who issued it is set at defiance, and that authority must be maintained. The sentence which we propose to pass is not to be looked upon as a sentence which is generally passed in such cases We take this more or less to be a test case, and we trust that when it is known that escape from such custody is an offence, the commission of such an offence will be avoided. We direct that, under section 225B of the Indian Penal Code, Gulab Singh, Bishnath Singh, Chatar Singh and Baldeo Singh, suffer, each and all of them, simple imprisonment for seven days from the date of their arrest

*Appeal allowed.*

## APPELLATE CIVIL.

1909
*November 1.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji*
SHAM DEI AND ANOTHER (PLAINTIFFS) v. BALJIT SINGH AND OTHERS (DEFENDANTS)*

*Civil Procedure Code (1882), sections 13, 43—Mortgage—Prior and subsequent mortgagees—Mortgaged property brought to sale and purchased by each mortgagee separately, the other not being made a party—Suit by prior mortgagee to bring to sale part of the mortgaged property in the hands of the subsequent mortgagee to recover unsatisfied balance of the mortgage debt*

The prior mortgagee of mortgaged property brought the whole of it to sale without impleading the subsequent mortgagee of a portion and purchased the mortgaged property himself The subsequent mortgagee in turn brought a portion of the mortgaged property to sale without impleading the prior mortgagee and also himself became the purchaser The prior mortgagee, after an unsuccessful attempt to recover from the subsequent mortgagee possession of the mortgaged property so purchased, sued to bring that property to sale for the realization of the unrecovered balance of the original mortgage money.

*Held*, that the suit was maintainable and was not barred by either section 13 or section 43 of the Code of Civil Procedure (1882)

THE facts of this case were as follows:—

On the 25th of February, 1874, Baljit Singh, Sarup Singh, Gopal Singh and Chandan Singh, members of a joint Hindu

* First Appeal No. 296 of 1907, from a decree of Pitambar Joshi, Additional Subordinate Judge of Aligarh, dated the 19th August 1907.

ladies in the years 1865, 1866 and 1867. The court below held them to be valid acknowledgments and decreed the claim

The first contention raised on behalf of the appellants is that those documents do not contain an acknowledgment of liability and that they do not amount in law to an acknowledgment of the mortgage, inasmuch as they were not signed by the ladies There cannot be any doubt that the mortgage in suit was in terms admitted by the ladies who executed those documents In fact they purported to sub mortgage and sell the rights which they possessed as holders of the mortgage of the 2nd of January 1842 The documents of 1865 and 1866 purported to have been executed by Musammat Jamni As she was illiterate, her signature was written on them by other persons Similarly the sale deed by Musammat Janki which purported to have been executed by her was signed for her by her husband There can be no doubt that their signatures were affixed on the documents under their authority. They themselves admitted execution before the officer who registered the documents The acknowledgments were therefore made and signed by them and not by their agents and in this respect we fully agree with the courts below

It is next urged that the acknowledgments made by the two ladies do not save the operation of Limitation Reliance is placed on the terms of section 19 of the Indian Limitation Act (No XV of 1877), and it is contended that as the acknowledgments were not made by the defendants themselves and as they do not derive title from the ladies who made them, a new period of limitation cannot be computed from the dates of the acknowledgments The provisions of section 19 differ in this respect from those of clause 15, section I of Act No XIV of 1859, which was the Act in force at the time when the acknowledgments were made and signed. Under that clause a new period of limitation could be reckoned in a suit for redemption of a mortgage from the date of an acknowledgment of the title of the mortgagor or of his right of redemption "given in writing signed by the mortgagee or some person claiming under him" Section 19 provides that an acknowledgment which would give a new start for the computation of limitation must be an acknowledgment by the defendant against whom the right of redemption is claime

would use ordinary prudence if he had resort to arrest instead of serving a writ of demand.

1909

EMPEROR v. GULAB SINGH.

For a defaulter to escape from a custody in which he has been locked and detained is not a very grievous offence; still it is an offence in which the authority of the officer who issued it is set at defiance, and that authority must be maintained The sentence which we propose to pass is not to be looked upon as a sentence which is generally passed in such cases We take this more or less to be a test case, and we trust that when it is known that escape from such custody is an offence, the commission of such an offence will be avoided. We direct that, under section 225B of the Indian Penal Code, Gulab Singh, Bishnath Singh, Chatar Singh and Baldeo Singh, suffer, each and all of them, simple imprisonment for seven days from the date of their arrest

*Appeal allowed.*

## APPELLATE CIVIL.

1909
*November* 1.

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji*
SHAM DEI AND ANOTHER (PLAINTIFFS) v BALJIT SINGH AND OTHERS (DEFENDANTS)*

*Civil Procedure Code (1882), sections 13, 43—Mortgage—Prior and subsequent mortgagees—Mortgaged property brought to sale and purchased by each mortgagee separately, the other not being made a party—Suit by prior mortgagee to bring to sale part of the mortgaged property in the hands of the subsequent mortgagee to recover unsatisfied balance of the mortgage debt*

The prior mortgagee of mortgaged property brought the whole of it to sale without impleading the subsequent mortgagee of a portion and purchased the mortgaged property himself The subsequent mortgagee in turn brought a portion of the mortgaged property to sale without impleading the prior mortgagee and also himself became the purchaser The prior mortgagee after an unsuccessful attempt to recover from the subsequent mortgagee possession of the mortgaged property so purchased, sued to bring that property to sale for the realization of the unrecovered balance of the original mortgage money.

*Held,* that the suit was maintainable and was not barred by either section 13 or section 43 of the Code of Civil Procedure (1882)

THE facts of this case were as follows :—

On the 25th of February, 1874, Baljit Singh, Sarup Singh, Gopal Singh and Chandan Singh, members of a joint Hindu

* First Appeal No 29o of 1907 from a decree of Pitambar Joshi, Additional Subordinate Judge of Aligarh, dated the 19th August 1907.

would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest, and until her death it could not be ascertained who would be entitled to succeed The same principle which has prevailed in the courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow" (p 608) Their Lordships held the decree to be binding on the reversioner, not on the ground that he derived his title from and was claiming under the widow, but on the ground that she fully represented the estate for the time and that "the greatest possible inconvenience would arise if the decree were not binding on the succeeding heirs" If the litigation was fairly and properly conducted, the widow was seeking to protect the estate and was acting for its benefit The decree passed in the litigation would therefore bind the estate in the hands of the person or persons who succeeded to it after her A widow acknowledging the right of redemption of the mortgagor in respect of a mortgaged estate cannot be *deemed to have acted* for the benefit of the estate It would be unreasonable to hold that her act would bind the estate and to apply *to a case like* this the analogy of the rule of *res judicata* referred to above Furthermore, their Lordships did not hold in the Shivagunga case or in other subsequent cases that a reversioner derived his title from the widow or other female heir holding a limited interest

Mr *Agarwala* next urges that as the acknowledgments made in this case were valid acknowledgments under Act No XIV of 1859 and Article 148, Schedule II of Act No IX of 1871, being acknowledgments by persons claiming under the mortgagee, the subsequent alteration of the law of limitation cannot affect the right of redemption of the plaintiff It is said that the plaintiff acquired a title by virtue of the acknowledgments, and that title cannot be taken away by subsequent legislation In support of this contention we are referred to section 2 of Act No XV of 1877, which provides that nothing contained in the Act

no party to the decree obtained by the sons of Lachman Das in 1881 and therefore the title of the plaintiffs was not of a character which would justify the ousting of the defendants though there was a flaw in the title of the latter The suit out of which this appeal has arisen was brought by Sham Dei and her adopted son for sale of the 13 biswansi and 6½ kachwansi share for a part of Rs 30 000 which was still due on the original mortgage and which had fallen to her share The suit was dismissed by the lower court on the ground that a suit for a part of the unrealized portion of the debt was not maintainable

Babu *Durga Charan Banerji* (with him Babu *Purushottam Das Tandan* for Pandit *Moti Lal Nehru*) for the appellants, submitted that the suit was maintainable and that the money being due on the original bond, every portion of the property hypothecated in the bond was liable to be sold for the debt The earlier suit brought by Sham Dei and Gobind had been rightly dismissed by the High Court, because no opportunity had been ever given to Bansi Dhar or his heir to redeem the property mortgaged to him, he having not been made a party to the decree obtained by the heirs of Lachman Das in 1881 That opportunity was given now by impleading the representatives of Bansi Dhar He cited *Balmakund* v *Musammat Sangari* (1) and *Kudratullah* v *Kubra Begam* (2)

The Hon'ble Pandit *Sundar Lal* (with him Mr *M L Agarwala* Babu *Satya Chandra Mukerji*, Munshi *Gulzari Lal* and Babu *Girdhari Lal Agarwala*) for the respondents —

The suit is practically one for foreclosure of the right of redemption of the puisne mortgagee The puisne mortgagee has a right to redeem the whole of the property Therefore an opportunity should be given to him to pay the whole amount of the mortgage and redeem the whole property The first sale is wholly void

STANLEY, C J, and BANERJI, J —The suit out of which this appeal has arisen was brought by two plaintiffs, namely Musammat Sham Dei and Narain Das, for sale of a 13 biswansi and 6½

(1) (1897) I. L. R 19 All, 379 (2) (1900) I. L. R 23 All, 25

English authorities have been cited We do not deem it necessary to refer to those cases as they do not appear to us to be in point If it be assumed that article 120 applies to the case, the plaintiff's right to sue admittedly arose on the death of Janki in 1898 and the 6 years' limitation prescribed by the Article expired in 1904 This suit which was not instituted until the 4th of March, 1907, was therefore beyond time Further, a *complete fusion of interests did not take place*, as Janki had only a limited interest in the mortgagee rights and it was this limited interest which the plaintiff purchased from her

The last contention on behalf of the plaintiff respondent is that the matter is *res judicata* under section 13, expl II, of Act No XIV of 1882, inasmuch as in the suit brought by the defendants in 1904 they could have claimed the whole estate, the equity of redemption having become extinct, but did not do so. We do not agree with this contention In the suit referred to, the defendants claimed only the rights of the mortgagee on the ground that Musammat Janki and her mother had only life estates and there was no legal necessity for the transfers made by them For that claim they were bound to put forward all matters which might have been made grounds of attack The extinction of the equity of redemption could not have been any ground for claiming the rights of the mortgagee, but would have been inconsistent with such a claim It may be said that they relinquished a part of the relief which they were entitled to ask for Such relinquishment would, under section 43, have barred a subsequent suit for that relief but cannot preclude a defendant from putting it forward as a defence to a suit brought against him

For the reasons stated above, we are of opinion that the claim is barred by limitation and that the acknowledgments relied upon by the plaintiff cannot take the case out of the operation of limitation We accordingly allow the appeal, discharge the decrees of the courts below and dismiss the suit with costs in all courts

*Appeal decreed.*

no party to the decree obtained by the son of Lachman Das in 1881 and therefore the title of the plaintiffs was not of a character which would justify the ousting of the defendants though there was a flaw in the title of the latter The suit out of which this appeal has arisen was brought by Sham Dei and her adopted son for sale of the 13 biswansi and 6½ kachwansi share for a part of Rs 30 000 which was still due on the original mortgage and which had fallen to her share The suit was dismissed by the lower court on the ground that a suit for a part of the unrealized portion of the debt was not maintainable

Babu *Durga Charan Banerji* (with him Babu *Purushottam Das Tandan* for Pandit *Moti Lal Nehru*) for the appellants, submitted that the suit was maintainable and that the money being due on the original bond, every portion of the property hypothecated in the bond was liable to be sold for the debt The earlier suit brought by Sham Dei and Gobind had been rightly dismissed by the High Court, because no opportunity had been ever given to Bansi Dhar or his heir to redeem the property mortgaged to him, he having not been made a party to the decree obtained by the heirs of Lachman Das in 1881 That opportunity was given now by impleading the representatives of Bansi Dhar He cited *Balmakund* v *Musammat Sangari* (1) and *Kudratullah* v *Kubra Begam* (2)

The Hon'ble Pandit *Sundar Lal* (with him Mr *M L Agarwala*, Babu *Satya Chandra Mukerji*, Munshi *Gulzari Lal* and Babu *Girdhari Lal Agarwala*) for the respondents —

The suit is practically one for foreclosure of the right of redemption of the puisne mortgagee The puisne mortgagee has a right to redeem the whole of the property Therefore an opportunity should be given to him to pay the whole amount of the mortgage and redeem the whole property The first sale is wholly void

STANLEY, C J, and BANERJI, J —The suit out of which this appeal has arisen was brought by two plaintiffs, namely Musammat Sham Dei and Narain Das, for sale of a 13 biswansi and 6½

(1) (1897) I L R, 19 All, 379 (2) (1900) I L R., 23 All, 25

by the respondents I deal with the case on the basis of the lower appellate court having found as a fact that the defendants respondents had notice of the mortgage when they sued for pre emption It is contended on behalf of the respondents that when the property was sold on the 7th of April, 1904, their right of pre emption arose and that the vendee could not sell or deal with the property so as to affect the rights of the pre emptors until after the period of limitation had expired They admit that the vendee could mortgage, but contend that if a pre emption suit was duly instituted, the mortgage of the appellants fell with it They contend that the right of pre emption is not a right of repurchase, but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all rights and obligations arising from the sale under which they derive their title See *Tejpal* v. *Girdhari Lal* (1) Mr *Sital Prasad* also quotes on behalf of the respondents the Full Bench decision in *Gobind Dayal* v *Inayat ullah* (2) The appellants on the other hand contend that the vendee has a perfect right to sell or otherwise deal with the property he has bought, right up to the time the pre-emption suit is instituted, and that it would be very unreasonable to hold that the purchaser who has purchased property must wait for a year before he can legally deal with the same Mr *Gobind Prasad*, for the appellants, quotes the decisions in *Serh Mal* v *Hukam Singh* (3) and *Narain Singh* v *Parbat Singh* (4) and a decision of a Bench of this Court in *Allahdad Khan* v *Munshi Abdul Halim* (5) In the first two cases it was held that where the property after being sold to strangers was re sold by the strangers to a co sharer before suit, there was no right of pre emption In the unreported case the property had been resold before the suit was instituted, and the court dismissed the suit on the ground that the plaintiff had sought to pre empt only the first sale If the right of the pre emptor is in the strict sense of the expression a right to be substituted for the vendee, I cannot see how the vendee can defeat his right by selling a second time I think it follows from the decision in *Serh Mal*

(1) (1905) I L R 30 All 130 at p 132
(2) (1885) I L R, 7 All 775
(3) (1897) I L R 20 All 100
(4) (1901) I L R 23 All, 217.
(5) S A No 7[illegible]1 of 190[illegible], decided 15th April, 1907.

4th of January, 1899, Sham Dei and Gobindi instituted a suit against Piare Lal and other purchasers from him for possession of the 13 biswansi 6½ kachwansi share mentioned above on the ground that they were prior purchasers of the said property in execution of the decree passed on the mortgage of the 25th of February, 1874 This claim was dismissed by this Court, on the ground that Bansi Dhar was not a party to the suit brought by the sons of Lachman Das for sale under the mortgage held by them Thereupon the present suit was brought for the sale of the 13 biswansi 6½ kachwansi share for the realization of Rs 5,100 out of the balance due under the mortgage of the 25th of February, 1874

1909

SHAM DEI v. BALJIT SINGH

The Court below has dismissed the suit, being of opinion that it is not maintainable

We are unable to agree with the learned Judge of the Court below The legal representatives of Lachman Das were competent, in the suit which they brought to enforce the mortgage of the 25th of February, 1874, to add the second mortgagee Bansi Dhar as a party to their suit In fact they were bound to do so for the purpose of giving to Bansi Dhar, who as subsequent mortgagee had a right of redemption, an opportunity to redeem their mortgage This opportunity was not afforded to Bansi Dhar, and therefore the sale of the 13 biswansi 6½ kachwansi share mortgaged to him was not binding on him It was on this ground, as we have said above, that the plaintiff's suit against Bansi Dhar's legal representatives for possession of the aforesaid share was dismissed The fact that Bansi Dhar was omitted from the suit brought upon the mortgage of 1874 does not preclude the present plaintiff, who has an interest in that mortgage from maintaining the present suit and seeking to bring to sale the 13 biswansi 6½ kachwansi share for the sale of which a proper decree had not been passed against Bansi Dhar The object of the suit is to afford to Bansi Dhar's legal representatives an opportunity to redeem the aforesaid share from the mortgage of 1874 There can be no bar to such a suit Sections 13 and 43 of the Code of Civil Procedure, 1882, are no bar to the suit inasmuch as Bansi Dhar was not a party to the first suit On this point there cannot be any doubt, and the court below is clearly in error in holding

by the respondents I deal with the case on the basis of the lower appellate court having found as a fact that the defendants respondents had notice of the mortgage when they sued for pre emption It is contended on behalf of the respondents that when the property was sold on the 7th of April, 1904, their right of pre emption arose and that the vendee could not sell or deal with the property so as to affect the rights of the pre emptors until after the period of limitation had expired They admit that the vendee could mortgage, but contend that if a pre emption suit was duly instituted, the mortgage of the appellants fell with it They contend that the right of pre emption is not a right of repurchase, but is simply a right entitling the pre emptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all rights and obligations arising from the sale under which they derive their title See *Tejpal* v *Girdhari Lal* (1) Mr *Sital Prasad* also quotes on behalf of the respondents the Full Bench decision in *Gobind Dayal* v *Inayat-ullah* (2) The appellants on the other hand contend that the vendee has a perfect right to sell or otherwise deal with the property he has bought, right up to the time the pre emption suit is instituted, and that it would be very unreasonable to hold that the purchaser who has purchased property must wait for a year before he can legally deal with the same Mr *Gobind Prasad*, for the appellants, quotes the decisions in *Serh Mal* v *Hukam Singh* (3) and *Narain Singh* v *Parbat Singh* (4) and a decision of a Bench of this Court in *Allahdad Khan* v *Munshi Abdul Halim* (5) In the first two cases it was held that where the property after being sold to strangers was re sold by the strangers to a co sharer before suit there was no right of pre emption In the unreported case the property had been resold before the suit was instituted, and the court dismissed the suit on the ground that the plaintiff had sought to pre empt only the first sale If the right of the pre emptor is in the strict sense of the expression a right to be substituted for the vendee, I cannot see how the vendee can defeat his right by selling a second time I think it follows from the decision in *Serh Mal*

(1) (1905) I L R 30 All 1 0 at p 132
(2) (1885) I L R 7 All 775
(3) (1897) I L R 20 All 100
(4) (1901) I L R 23 All 247.
(5) S A No 721 of 1905, decided 15th April, 1907.

*Before Sir John Stanley Knight, Chief Justice, and Mr Justice Karamat Husain*

1909
November 18

GIRRAJ SINGH AND OTHERS (PLAINTIFFS) *v* HARGOBIND SAHAI AND OTHERS (DEFENDANTS) *

*Land holder and tenant—Rights of tenant occupying a house in the abadi—Custom—Evidence—Nature of evidence requisite to prove custom—Second appeal*

The High Court in second appeal has jurisdiction to consider the evidence given in support of an alleged custom and to determine whether or not that evidence is sufficient in point of law to establish the custom set up, *Hashim Ali* v *Abdul Rahman* (1) and *Ram Bilas* v *Lal Bahadur* (2) followed.

THE facts of this case were as follows.—

The plaintiffs were zamindars of a village, named Budhsana, in the district of Meerut Hargobind Sahai, one of the defendants, was a tenant in that village, and as such occupied the house which is the subject-matter of dispute On January 12th, 1900, Hargobind Sahai sold the house to Ramji Lal and others, the defendants in this suit The plaintiffs sued to set aside the sale on the allegation that Hargobind being a tenant in the village had no right to transfer the house without the permission of the zamindar The defence was that the village was a *kasba* and there was a custom prevailing in the *kasba* that the tenants could sell their houses without the consent of the landlord. The court of first instance, holding that a custom such as alleged by the defendants existed, dismissed the suit On appeal the learned Additional Judge confirmed the finding of the court below, but added that such sales were limited only to the materials of the house and the right of residence therein To this extent he modified the decree of the court of first instance The plaintiffs appealed to the High Court.

*Dr. Tej Bahadur Sapru* (with him Pandit *Moti Lal Nehru*), for the appellants According to the common law prevailing in these provinces, an agriculturist who builds a house for his occupation in the *abadi*, obtains a mere right to use that house for himself and his family so long as he maintains the house

* Second Appeal No 1031 of 1907 from a decree of Muhammad Ahmad Ali Khan Additional Judge of Meerut dated the 28th of May 1907, modifying a decree of Bhawani Chandar Chakravarti, Officiating Subordinate Judge of Meerut, dated the 19th of July 1904

(1) (1903) I L. R 23 All, 698 (2) (1907) I L R, 30 All, 311.

for the sale This sum they paid and then were placed in possession The vendors (mortgagees) have now sued to enforce their mortgage Adit Singh having died, they made his two sons parties to the suit and they also impleaded the pre emptors, as owners of the mortgaged property They asked for a decree for sale of the property in the first instance, and in the alternative for a decree against the persons and property of the sons of Adit Singh The first court granted them a decree for sale and dismissed their alternative claim They preferred no appeal, but the present appellants (pre emptors) did The lower appellate court held that the property was not liable for the mortgage debt in the hands of the pre emptors, and dismissed the suit as *against the appellants* A *second appeal was preferred* to this Court, and the learned Judge who heard it held in favour of the plaintiffs that the property was liable in the hands of the pre emptors for the mortgage debt, decreed the appeal, and remanded the case for decision on the merits The defendants pre-emptors have therefore preferred this appeal under the Letters Patent The sons of Adit Singh were not parties to the second appeal and are not parties to this appeal.

It is urged that the learned Judge of this Court was mistaken in the facts of the case, as he was under the misapprehension that the mortgagees were not parties to the pre emption suit. His judgment shows this to be correct. The mortgagees were the vendors of the property which was the subject of the pre-emption suit They were therefore parties, though they did not defend No mention of the mortgage is to be found in the judgment of the suit for pre-emption

It is next urged that the right of pre-emption is not a right of purchase, but a right to be substituted for the vendee as he stood at the moment of the sale, that the vendee's right as a purchaser was not an indefeasible right, as it was subject to the appellants' right of pre emption, and the vendee therefore could not defeat the pre emptive right by subsequently mortgaging the property, and thus force the pre emptor to take the property subject to a mortgage thus created In our opinion this

without the permission of the zamindari; *Chajju Singh* v *Kanhia* (1)

STANLEY, C J, and KARAMAT HUSAIN, J —In the suit out of which this appeal has arisen the plaintiffs claimed to have a sale deed, executed and registered on the 12th of January, 1900, set aside as being void and also on account of breach of conditions on the part of the defendant in possession of a certain house. The house in question is situate in the village of Budhana in the Meerut district That village belongs to the plaintiffs, who are the zamindars The defendant No 1, Hargobind Sahai, was a tenant of the plaintiffs, and he sold the house in question and the site of it to the defendants 2 to 5 The plaintiffs allege in their plaint that the defendant No 1 constructed the house in dispute with the permission of the plaintiffs, and that under the terms of the *wajib-ul-arz* of the village no ryot was entitled to sell, or mortgage, or make a gift of any house or enclosure in the village, and that, despite this provision of the *wajib ul arz*, the defendant without the permission of the plaintiffs sold the house in question to Bansidhar, the ancestor of the defendants 2 to 5 The court of first instance dismissed the plaintiffs' claim, being satisfied on the evidence that a custom prevailed in the village whereby tenants were empowered to sell their houses and the site of them so long as the houses stood On appeal the learned Additional Judge found that the custom alleged by the defendants was fully established by a great mass of evidence, including a large number of deeds of sale and mortgage He was of opinion that the *wajib ul-arz* on which the plaintiffs relied was prepared at the instance of the zamindar and therefore did not embody the custom prevailing in the district Accordingly in his decree of the 28th May, 1907, he upheld the decree of the court below, save that he declared that ' the sale of the enclosure does not affect the land in any way " An appeal was preferred to this Court, and upon the hearing of it the Court was at a loss to understand what the modification in the decree of the court below meant, and accordingly allowed the hearing to stand adjourned so that the parties might have an opportunity of

(1) Weekly Notes, 1881, p. 114.

pre emption is actually enforced, possesses no such right in the subject of pre emption as would entitle him to any benefit arising out of the property which he is entitled to take but has not yet taken

In support of the contention that a vendee is entitled to deal with the property as he likes until the pre emption suit is instituted, attention is called to an unreported decision of a Bench of this Court in S A No 724 of 1905, *Allahdad Khan* v. *Munshi Abdul Hakim*, decided on 15th April, 1907 In that case the vendee had resold to another stranger, prior to the institution of the suit, and the latter was in possession The vendee pleaded that he had sold and had no longer any interest in the property, and so the second vendee was made a party to the suit, but the plaintiff did not amend his plaint, nor seek to pre empt both sales, and for this reason his suit failed It is clear, however, that if he had amended his plaint his claim would have been decreed, granting that he had a right of pre emption This clearly indicates that the first vendee had no power to so dispose of the property to a stranger as to defeat the pre emptive right In the present case however, the second transfer is only a mortgage

Our learned brother was of opinion that possibly it would have been sufficient in the present case if the mortgagees had been made parties to the pre emption suit so that the sale price might not have been paid to the mortgagor behind their backs As a matter of fact they were impleaded, but on their behalf it is contended that they could not have pleaded the mortgage as a defence to the suit This may be so, but at least they had an opportunity of placing their hands upon the money paid into court by the pre-emptor, and if they have not done so it is their own fault Their mortgagor's right to the property was subject to the appellants' right of pre emption He could not pass a better title than he had himself, and they took the mortgage at their own risk To allow a vendee thus to mortgage property while subject to the pre-emptor s right so as to bind it in the hands of the pre emptor, would open the door to fraudulent transactions calculated to defeat the right of pre emption The very nature of this right,

therefore we do not see our way to reverse it. According to that custom a tenant occupying a house in the *abadi* of the village is entitled to sell the materials of his house and also the right to occupy the site of the house so long as the house is standing. We therefore declare that the sale-deed of the 12th of January, 1900, is valid and binding so far as it purports to transfer to the vendee the materials of the house in question and the right of residence in that house so long as it stands. Beyond this the transferee has acquired no interest in the property. The appellants have substantially failed and must bear the costs of this appeal as also the costs in the courts below.

1909

GIRRAJ SINGH v. HARGOBIND SAHAI.

Objections have been filed, but are not pressed. We dismiss them, but without costs

*Appeal dismissed*

---

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

1909 *November 29.*

GHAFUR-UD-DIN (PLAINTIFF) *v.* HAMID HUSAIN AND OTHERS (DEFENDANTS) *

*Civil Procedure Code (1882), sections 244, 283—Property attached in execution of decree purchased while under attachment—Decree set aside—Purchaser not the representative of the judgment-debtor.*

Where a decree is set aside in appeal everything done in pursuance of that decree comes to an end. Hence where property which was subject to an attachment was purchased, but the decree under which the attachment was levied was set aside, it was held that the purchaser was not the representative of the judgment-debtor within the meaning of section 244 of the Code of Civil Procedure, 1882.

THE facts of this case are as follows:—

The plaintiff, Ghafur-ud-din, brought a suit against one Fakhr-ud-din on the 15th of March, 1897, to recover a dower debt due to his sister Musammat Shakur-un-nissa, who had died in 1904. His suit was decreed *ex parte* on the 19th of January, 1898. After the decree Ghafur-ud-din applied for execution and got certain properties of Fakhr-ud-din attached on the 17th of February, 1898. The judgment-debtor appealed against the *ex parte* decree, and it was subsequently set aside by the High Court in March 1898. The High Court remanded the case to the

---

* First Appeal No. 29 of 1908 from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 25th of November, 1907.

decree was struck off the files on the 24th of December, 1898 This Court set aside the *ex parte* decree on the 26th of November, 1900 and remanded the case to the court below for fresh trial The lower court re heard the case and made a decree for Rs 75, but upon appeal to this Court that decree was varied and a decree was made on the 27th of April, 1904, for the full amount claimed by the plaintiff Meanwhile Fakhr ud din died and his second wife Latif un nissa and his sister Nasir un nissa were brought upon the record as his legal representatives After the passing of the final decree of this Court, application was made for execution of that decree and certain property was attached in 1905 The defendant Hamid Husain filed an objection and prayed for the release of the property from attachment on the allegation that under a sale made in his favour on the 9th of August 1898, he was the owner of the property and it was not liable to sale This objection having been allowed, the suit out of which this appeal has arisen was brought by the plaintiff for a declaration that the property was liable to be sold in execution of his decree The Court below has dismissed the suit on the ground that Hamid Husain must be deemed to be a representative of the judgment-debtor within the meaning of section 244 of Act No XIV of 1882 and that the suit was therefore not maintainable It is contended on behalf of the appellant that as the decree made by the Court of first instance on the 19th of January, 1898 was set aside by this Court, everything which took place in execution of that decree came to an end, and that therefore by reason of his having purchased the property during the pendency of an attachment in execution of the decree which was set aside, the defendant cannot be deemed to be the representative of the judgment-debtor within the meaning of section 244 This contention is in our judgment well founded Indeed the learned counsel for the respondent has not disputed its correctness As the decree in execution of which the property was attached in 1898 was set aside by this Court on the 26th of November, 1900, everything that was done in pursuance of that decree came to an end, and therefore the defendant cannot be said to be the purchaser of the property pending a subsisting attachment The matter could not form the subject of an adjudication under section 244 of the Code

# DISTRICT

# GAZETTEERS,

## UNITED PROVINCES.

---

*The undermentioned Gazetteers of Districts in the United Provinces have recently been published by the Government Press, and are available for sale to the public at the Government Book Depot, Allahabad. The prices quoted include packing and postage charges :—*

| District | | Rs. | a. | p. |
|---|---|---|---|---|
| Bulandshahr | ... | 3 | 6 | 0 |
| Bahraich | ... | 2 | 14 | 0 |
| Sultanpur | ... | 2 | 14 | 0 |
| Unao | ... | 3 | 6 | 0 |
| Hardoi | ... | 3 | 6 | 0 |
| Bara Banki | ... | 3 | 6 | 0 |
| Sitapur | ... | 2 | 14 | 0 |
| Kheri | ... | 2 | 14 | 0 |
| Meerut | ... | 3 | 6 | 0 |
| Lucknow | ... | 3 | 6 | 0 |
| Ballia | ... | 3 | 6 | 0 |
| Muzaffarnagar | ... | 3 | 6 | 0 |
| Naini Tal | ... | 3 | 6 | 0 |
| Rae Bareli | ... | 2 | 14 | 0 |
| Partabgarh | .. | 2 | 14 | 0 |
| Fyzabad | ... | 3 | 6 | 0 |
| Gonda | ... | 3 | 6 | 0 |
| Agra | ... | 3 | 6 | 0 |
| Fatehpur | ... | 3 | 6 | 0 |
| Basti | ... | 3 | 6 | 0 |
| Budaun | ... | 3 | 6 | 0 |
| Bijnor | ... | 3 | 6 | 0 |
| Jaunpur | ... | 4 | 6 | 0 |
| Benares | ... | 4 | 6 | 0 |
| Ghazipur | ... | 3 | 6 | 0 |
| Pilibhit | ... | 2 | 14 | 0 |
| Banda | ... | 3 | 6 | 0 |

*Apply to the SUPERINTENDENT,*

*Government Press, Allahabad.*

Objection was taken to this, but was rejected by the Subordinate Judge, whose order was upheld on appeal On August 5th, 1908, one Abheraj Singh who was a sub-tenant of 4 bighas out of one of the plots began to plough up a portion of the land, which formed no part of his sub tenure but was part of the land, actual possession of which had been given to the auction purchasers This led to a riot between Chattardhari's party and that of Ganga Saran Singh, in which Abheraj Singh and another were killed. Chattardhari and his brother and others were tried and convicted, but Chattardhari was acquitted on appeal After his acquittal Chattardhari preferred a complaint of criminal trespass against Ganga Saran Singh and his party in respect of the occurrence of August 5th, 1908, while Krishna Prasad Singh, one of the present applicants, preferred a complaint against the patwari While the former of these two complaints was still pending, the time had arrived for the rabi crops sown on the land to be cut Both sides applied to the Magistrate, each stated that the other was prepared to use force and that there was every likelihood of a breach of the peace On this the Magistrate issued an order (in which however he omitted to set forth the material facts of the case) ostensibly under section 144 of the Code This was on the 4th March, 1909 The order runs as follows —' Notice to issue to parties under section 144 If the crops are ripe, the police will have them reaped with the consent of the parties' On the 10th March, 1909, Chattardhari's complaint came on for hearing It had often been adjourned, and though he and the accused attended, he again produced no evidence The Magistrate therefore dismissed the complaint and then started proceedings under section 145 of the Code with the following order —' To day case No 4 *Bhagwat Prasad* v *Ganga Saran Singh and others* under section 447, Indian Penal Code, was put up for hearing at Khajwa The complainant has appeared without his witnesses The accused are present Since the case has often been adjourned, I dismiss it, and as in connection with this case, an injunction has been issued to the parties in regard to the crops of the cultivated area, it is proper to take action under section 145, Criminal Procedure Code It is therefore ordered that notice be issued under section 145, Criminal Procedure Code, against those persons to whom notice was issued under section 144'

'As an order under section 145 of the Code this appears to be defective I can only infer from it that the Magistrate was satisfied that a breach of the peace was likely by reason of the information given to him by the parties, on which he had deemed it necessary to take action under section 144 This I gather from his reference to the proceedings taken by him ostensibly under that section and by his reference to Chattardhari's complaint which he dismissed on 10th March, 1909 A reference to the former of the above two records shows that he had received information from both parties that a breach of the peace was likely owing to the dispute concerning this land. His satisfaction as to the existence of the dispute and that it was likely to cause a breach of the peace may be gathered from the fact that in his order he states that it is proper that action should be taken under section 145 The order, however, is clearly not properly drafted It ought to have set forth his reasons for being satisfied It is not necessary, however, in my opinion that it should be absolutely self contained, provided that the parties have full

1909

GANGA SARAN SINGH v. BHAGWAT PRASAD.

defective order is an irregularity in the exercise of jurisdiction by the Magistrate not necessarily vitiating the subsequent proceedings but justifying the interference of this Court, if it is shown that either party has been prejudiced by reason thereof.' It is this same question which in my opinion arises in the present case also for decision. In his initial order the Magistrate has merely referred to the order purporting to have been passed under section 144 and then says that it is proper to take proceedings under section 145. There is no doubt that the previous history of the case and the complaints made by both parties gave him good information and that he had every reason to be satisfied of the existence of a dispute likely to cause another breach of the peace. RAMPINI and MOOKERJEE, JJ, in their referring order remarked —"We are consequently unable to hold that the omission to state the grounds in the initial order makes it an order without jurisdiction so as to invalidate the whole proceedings.' Their reasons are set forth on pages 355 to 358 of the report. It is unnecessary for me to repeat them Their reasons appear to me to be good law and for those same reasons I should hold that in the present case the Magistrate's final order was not without jurisdiction and that the applicants have not been in any way prejudiced. The question, however, is one of some importance and the trend of opinion so far as it has been expressed in decisions of this Court appears to be the opposite way. I therefore deem it advisable to refer this case for the decision of a Bench of two Judges and I accordingly refer it."

The case was accordingly placed before a Division Bench and re-argued.

Mr. *M. L. Agarwala,* for the applicants.

Mr. *B. E. O'Conor,* for the opposite party.

KNOX and KARAMAT HUSAIN, JJ.—In this case there was a written order and though it may be a defective one still both sides were fully cognizant, as appears from the written replies they filed, of the matter in dispute. There was also no doubt a danger of the breach of the peace. This being so, we do not deem it expedient to exercise our power in revision, and therefore dismiss the application.

[See also Weekly Notes, 1907, pp. 50 and 265—ED.]

| | |
|---|---|
| The Bombay Code Vol I, Third Edition 1907 | Rs 4 (8 a) |
| Ditto Vol II, Third Edition 1907 | Rs 6 (8 a) |
| Ditto Vol III, Third Edition 1908 | Rs 5 (8 a) |
| Ditto Vol IV Third Edition, 1909 | Rs 4 (8 a) |
| Volumes I to IV Reduced to Rs 11 per set. | |
| The Coorg Code Third Edition, 1908 | Rs 2 (4 a) |
| E B & Assam Code Vol I Edition 1907 | Rs 6 (10 a) |
| Ditto Vol II Edition 1907 | Rs 6 (9 a) |
| Ditto Vol III Edition 1907 | Rs 6 (9 a) |
| Volumes I to III reduced to | Rs 16 (per set) |
| The United Provinces Code Volume I, Fourth Edition 1906 consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table | Rs 5 (8 a) |

The United Provinces Code, Vol II Fourth Edition 1906 consisting of the Acts of the Lieutenant Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in, or extended to the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874, with an Index. Rs 10 (Re 1) for both Vols or Rs 5 (8 a) for each Volume

The United Provinces Code, Vols I and II reduced to Rs 7 per set

*In the Press*

A Digest of Indian Law Cases 1908 by C E Grey, Barrister at Law

A new edition of the Burma Code

## II—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION

| | |
|---|---|
| Act I of 1846 (Legal Practitioners) as modified up to 1st October 1907 | 2 a (1 a) |
| Act XXXVII of 1850 (Public Servants Inquiries) as modified up to 1st August, 1908 | 11 a (1 a) |
| Act XXX of 1852 (Naturalization of Aliens) as modified up to 30th April 1908 | 2 a (1 a) |
| Act XX of 1853 (Legal Practitioners) as modified up to 1st September 1907 | 1 a 9 p (1 a) |
| Act XXIII of 1855 (Administration of mortgaged Estates) as modified up to 1st October 1908 | 1 a 3 p (1 a) |
| Act XXIV of 1855 (Penal Servitude) as modified up to 1st January 1909 | 2 a (1 a) |
| Act XIII of 1857 (Opium) as modified up to 1st August 1908 | 4 3 p (1 a) |
| Act IX of 1859 (Forfeiture) as modified up to 1st October 1909 | 1 a 9 p (1 a) |
| Act XXIV of 1859 (Madras District Police) as modified up to 1st November 1907 | 3 a 6 p 2 a) |
| Act XVI of 1863 (Excise Duty on Spirits) as modified up to 1st October 1908 | 2 a (1 a) |
| Act XXXI of 1863 (Gazette of India) with footnotes | 1 a 3 p (1 a) |
| Act X of 1865 (Succession) as modified up to 1st April 1909 Rs 1 8 | (2 a) |
| Act XXII of 18[illegible] (Sarais and Parraos) as modified up to 1st August 1908 | 2 a (1 a) |
| Act XXV of 1867 (Press and Registration of Books) as modified up to 1st October 1907 | 5 a (1 a) |
| Act V of 18[illegible] (Indian Articles of War) as modified up to 1st January 1909 | Rs 1 [illegible] (3 a) |
| Act V of 1870 (Unclaimed Deposits) as modified up to 1st October 1908 | 1 a (1 a) |
| Act VII of 1870 (Court Fees) as modified up to 1st February 1909 | Re 1 (1 a) |
| Act XXVII of 1871 (Criminal Tribes) as modified up to 1st October 1908 | 6 a 6 p (1 a 6 p) |

KNOX and PIGGOTT, JJ—This is a decree holder's appeal The essential facts are the following —On May 23rd, 1893, the decree of the first court was passed against one Muhammad Malih On February the 15th, 1894, this decree was confirmed by the District Judge on appeal A second appeal was pending when Muhammad Malih the appellant died An application was presented by one Mubarak Husain who claimed to be his legal representative, but on the 29th of March, 1897, the High Court held that there were other heirs of Muhammad Malih, namely, his daughters, who should have been brought on the record The order thereupon passed was as follows —"Ordered and decreed that this appeal do abate and the appellant pay Rs 83, costs incurred in this Court, and the costs in the lower court be paid as awarded by the lower court" The application for execution out of which this appeal arises was presented on the 14th of August, 1907, and the point for determination is whether the said application is barred by limitation under the provisions of the latter part of section 230 of the Code of Civil Procedure, Act XIV of 1882 The provisions of the said section, on the face of them, appear to be intended to allow a period of 12 years' limitation, in the case of an appeal, from the date of the decree of the appellate court The courts below have held that this case is governed by the ruling of this Court in *Fazl Husain* v *Raj Bahadur* (1) This was in any case a ruling under article 179 of the second schedule to the Indian Limitation Act (XV of 1877) It seems to have been doubted by a Judge of this Court in *Kewal* v *Tirkha* (2), and is difficult to reconcile with the principle which appears to underlie such rulings as *Rup Singh* v *Mukhraj Singh* (3) and *Akshoy Kumar Nundi* v *Chunder Mohun Chathati* (4) In any case there seems to us clearer authority on the opposite side in a ruling of the Calcutta High Court which bears directly upon the section now under consideration We refer to *Mahomed Mehdi Bella* v *Mohini Kanta Saha Chowdhry* (5) It could not fairly be contended that the decree of the High Court of March 29th, 1897, was incapable of execution, at least in respect

(1) (1897) I L R 20 All. 124
(2) (1905) 3 A L J R 8
(3) (1885) I L R 7 All 887
(4) (1888) I L R, 16 Calc 250
(5) (1907) I L R., 34 Calc, 874

| | | |
|---|---|---|
| Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February, 1908 | | In Nagri 9 p (1 |
| Act I of 1906 [Indian Tariff (Amendment)] | | In Urdu 3 p (1 |
| Ditto | ditto | In Nagri 3 p (1 |
| Act III of 1906 (Coinage) | | In Urdu 9 p. (1 a.) |
| Ditto | ditto | In Nagri 9 p (1 a.) |
| Act V of 1906 (Stamp Amendment) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a.) |
| Act III of 1907 (Provincial Insolvency) | | In Urdu 1 a 6 p |
| Ditto | ditto | In Nagri 1 a 6 p |
| Act IV of 1907 [Repealing and Amending (Rates and Cesses)] | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act V of 1907 (Local Authorities Loan) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a.) |
| Act VI of 1907 (Prevention of Seditious Meetings) | | In Urdu. 3 p (1 a.) |
| Ditto | ditto | In Nagri 3 p. (1 a.) |
| Act I of 1908 (Legal Practitioners) | | In Urdu 3 p (1 a.) |
| Ditto | ditto | In Nagri 3 p (1 a.) |
| Act II of 1908 (Tariff) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act V of 1908 (Code of Civil Procedure) | | In Urdu Re 1 2 a (6 |
| Ditto | ditto | In Nagri Re 1 2 a (6 a |
| Act VI of 1908 (Explosive Substances) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act VII of 1908 (Incitements to offences) | | In Urdu. 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act IX of 1908 (Limitation) | | In Urdu 2 a (1 a) |
| Ditto | ditto | In Nagri 2 a (1 a) |
| Act X of 1908 (Salt Duties) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p. (1 a) |
| Act XI of 1908 (Assam Labour and Emigration) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (2 a) |

## V.—MISCELLANEOUS PUBLICATIONS

| | | | |
|---|---|---|---|
| Table showing Effect of Legislation in the Governor General's Council during 1906 | | | 3 a 6 p (1 a) |
| Ditto | ditto | during 1907 | 2 a 6 p (1 a.) |
| Ditto | ditto | during 1908 | 4 a (1 a) |

Annual Indexes to the Acts of the Governor General of India in Council for 1906 and 1907 The price is noted on them

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date Super royal 4to Annual subscription Rs. 5 (Re 1); single issue 4a, including postage

| | | | |
|---|---|---|---|
| Addenda and Corrigenda List No I of 1906 to the List of General Rules and Orders | | | 3 p (1 a) |
| Ditto | ditto | No II of 1906 | 1 a 9 p. (1 a) |
| Ditto | ditto | No. I of 1907. | 3 p (1 a) |
| Ditto | ditto | No II of 1907 | 1 a (1 a) |
| Ditto | ditto | No I of 1908 | 1 a 6 p (1 a.) |
| Ditto | ditto | No II of 1908 | 2 a 9 p (1 a) |

A Digest of Indian Law Cases, containing the High Court Reports and Privy Council Reports of Appeals from India 1901-03 with an Index of cases, compiled under the orders of the Government of India by F. G. Wigley of the Inner Temple, Barrister-at-Law, Edition [illegible] Rs. 10 Reduced to Rs. 5 per copy — (10 a.)

1909

MATI ULLAH KHAN v. BANWARI LAL.

portion of his property to Prag Narain for Rs 4 000 and left with him out of this amount Rs 2,600 for payment to Bhola Nath, being the amount due to him under his three bonds On the 16th of September, 1901, Prag Narain mortgaged this property to Hardwari Lal for Rs 3,300, out of which Rs 2 200 were left with the mortgagee for payment to Bhola Nath aforesaid This amount was paid by Hardwari Lal to Bhola Nath, and the latter's mortgages were thus discharged Hardwari Lal then brought a suit against his mortgagors and obtained a decree on the 9th of September, 1902, in execution of which the mortgaged property was sold and purchased by Mati-ullah Khan on the 31st of March, 1904 Banwari Lal sued to enforce the security in his favour, and impleaded, among others, the said auction purchaser The latter set up the mortgages in favour of Bhola Nath as a shield against the claim This defence was overruled by the court of first instance relying on the ruling in *Baijnath* v *Murlidhar* (1) and a decree passed in favour of the plaintiff The defendant Mati ullah appealed

Mr *A. E Ryves* (with him Maulvi *Ghulam Mujtaba*) for the appellant, submitted that the doctrine of *Toulmin* v *Steere* (2) was not applicable in India, and relied upon the following authorities:—*Gokal Das* v *Puran Mal* (3), *Tulsa* v *Khub Chand* (4), *Vanmikalinga* v *Chidambara* (5), *Mamraj* v. *Ramji Lal* (6), and *Baldeo* v *Uman Shankar* (7)

Dr *Satish Chandra Banerji* (for Pandit *Moti Lal Nehru*), for the respondent plaintiff, cited *Baijnath* v *Murlidhar* and (1) *Tufail Fatima* v *Bitola* (8) and contended that the test to be applied was whether the money which went to discharge a prior incumbrance was the mortgagor's money or the subsequent incumbrancer's. The mortgagor could not set up as a shield the mortgage he had himself discharged and it made no difference that instead of making the payment personally he directed another person, who held money to his credit, to apply that money to the payment of a prior incumbrance The decision in *Baij Nath's* case was affirmed in Letters Patent Appeal *

(1) Weekly Notes 1907, p 65
(2) (1897) 3 Mer 210
(3) (1884) I L R 10 Calc 1035, 1046
(4) (1891) I. L. R., 13 All., 581
(5) (1905) I L R 29 Mad 37.
(6) (1909) 7 A L J 15
(7) (1907) I L. R., 31 All., 1
(8) (1904) I. L. R 27 All., 400

* Per STANLEY, C. J., and BANERJI, J., L. P. A. No 29 of 1907 decided on January 4th, 1908.

# List of Books and Publications for sale which are more than two years old

## LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the office of the Superintendent of Government Printing India, No 8 Hastings Street Calcutta ]

THE PRICES OF THE GENERAL ACTS, LOCAL CODES, MERCHANT SHIPPING DIGEST AND INDEX TO ENACTMENTS HAVE BEEN CONSIDERABLY REDUCED

### I—THE INDIAN STATUTE BOOK

REVISED EDITION

*Super royal 8vo, cloth lettered*

### A.—STATUTES

| | |
|---|---|
| A Collection of Statutes relating to India, Volume I, containing the Statutes up to the end of 1890 Edition 1899 | Rs 6 (10 a) |
| A Collection of Statutes relating to India, Volume II, containing the Statutes from 1891 to 1898 Edition 1900 ... | Rs 8 (10 a) |

### C—LOCAL CODES

| | |
|---|---|
| The Ajmer Code Third Edition 1905 containing the enactments in force in Ajmer Merwara with an Appendix consisting of a list of the Enactments which have been declared in force in or extended to Ajmer Merwara by notification under the Scheduled Districts Act, 1874, a Chronological Table and an Index ... ... | Rs 2 8 (7 a.) |
| The Baluchistan Code, Edition 1900, containing the local enactments in force in British Baluchistan and the Agency territories, with Chronological Tables and an Index ... | Rs 5 (10 a) |
| The Burma Code Edition 1899 ... | Rs 5 (9 a) |
| The Central Provinces Code, Third Edition 1904 consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the Central Provinces, with an Appendix containing a list of the Acts which have been applied to the Scheduled Districts of the Central Provinces by notification under the Scheduled Districts Act, 1874; and an Index ... ... | Rs 4 (8 a) |
| The Madras Code Vols I and II Edition 1902 Rs 12 Reduced to | Rs 8. (Rs 1) |
| The Punjab and North West Code, Edition 1903, consisting of the unrepealed enactments locally in force in the Punjab and the North-West Frontier Province with Appendix and Index ... | Rs 6 (10 a) |

### II—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION

| | |
|---|---|
| Acts X of 1841 and XI of 1850 (Registration of Ships) as modified up to 1st December, 1903 (with footnotes brought down to 1st December 1901) | 7 a (1 a) |
| Act XX of 1847 (Copyright), as modified up to 1st December, 1903 ... | 6 a (1 a) |
| Act XVIII of 18[illegible] (Judicial Officers Protection) with footnotes | 1 a 9 p (1 a) |
| Act XIX of 18[illegible] (Apprentices) as modified up to 1st May 1903 | 3 a 6 p (1 a) |
| Act XXXI[illegible] of 18[illegible] [illegible] up to [illegible] April 1903 | 2 a 6 p (1 a) |
| Act VIII of 18[illegible] (T[illegible] and [illegible]), as modified up to 1st June, 18[illegible] ... ... | 2 a 6 p (1 a) |
| Act XII of 18[illegible] ([illegible] Representatives [illegible]), as modified up to 1st [illegible]ember, 1904 ... | 1 a (1 a) |
| Act XL[illegible] of 18[illegible] ([illegible]), as modified up to 1st December 1903 ... | [illegible] (1 a) |

After the sale to Prag Narain the mortgagor ceased to have any interest in the mortgaged property and those interests vested in Prag Narain under his purchase Hardwari Lal, as mortgagee from Prag Narain, was thus a subsequent mortgagee of the property As such subsequent mortgagee he redeemed the prior mortgages held by Bhola Nath, and therefore under the provisions of section 74 of the Transfer of Property Act, he was entitled to take the benefit of the securities held by Bhola Nath Further, as upon his discharge of the prior mortgages held by Bhola Nath the mortgage deeds were handed over to him, this is evidence of his intention to keep the mortgages alive He was therefore entitled to hold them up as a shield against the claim of the subsequent mortgagee This was so held in *Kallu* v *Sant Lal* (1), and is in agreement with the unreported decision in *Baldeo Prasad* v *Uman Shankar* (2), Second Appeal No 1069 of 1905, decided on the 6th April, 1907, and also with the decision in *Mamraj* v *Ramji Lal* (3), Second Appeal No 757 of 1908, decided on the 25th of May, 1909 which has not yet been reported The case on which the court below has relied is distinguishable from this case The circumstances of that case were peculiar, and having regard to those circumstances the puisne mortgagee was held to be entitled to enforce his mortgage against the subsequent purchaser, who had discharged prior incumbrances

For the above reasons we are of opinion that the plaintiff Banwari Lal is not entitled to bring the mortgaged property to sale without discharging the prior mortgages which have been paid off by Hardwari Lal The court below has not determined what amount, if any, is due on those prior mortgages We cannot therefore decide this appeal without obtaining findings on the following issues, which we refer to the court below under the provisions of order 41 rule 25, of the Code of Civil Procedure —

(1) What amount if any, is due on each of the mortgages held by Bhola Nath, dated respectively the 15th of August, 1894, the 11th of December, 1894, and the 14th of September, 1895?

(2) Is the claim under any and which of these mortgages barred by limitation?

(1) Weekly Notes, 1896 p 129 (2) Since reported, I. L. R. 32 All., 1.
(3) Since reported, 7 A L. J., 15.

| | | |
|---|---|---|
| Act XXVI of 1881 (Negotiable Instruments) as modified up to 1st August, 1907 | 10 a | (1 a) |
| Act II of 1882 (Trusts) as modified up to 1st June 1903 | 10 a | (1 a) |
| Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1905 | 15 a | (2 a) |
| Act V of 1882 (Indian Easements) as amended by the Repealing and Amending Act 1891 (XII of 1891) | 8 a | (1 a) |
| Act VI of 1882 (Companies) as modified up to 1st August, 1906 | Rs 1 10 a | (3 a) |
| Act XII of 1882 (Salt) as modified up to 1st December, 1890 | 6 a | (1 a) |
| Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1906 | 10 a | (2 a) |
| Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December 1904 | 6 a | (1 a) |
| Act VIII of 1883 (Little Cocos and Preparis Islands Laws) as modified up to 1st October 1902 | 1 a 3 p | (1 a) |
| Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906 | 2 a 6 p | (1 a) |
| Act VI of 1884 (Inland Steam vessels) as modified up to 1st July, 1891 | 9 a | (2 a) |
| Act VII of 1884 (Steam ships) as modified up to 1st July 1890 | 6 a | (1 a) |
| Act XII of 1884 (Agriculturists' Loans) as modified up to 1st February, 1903 | 2 a | (1 a) |
| Act XVIII of 1884 (Punjab Courts) as modified up to 1st December 1899 | 7 a | (1 a) |
| Act XIII of 1885 (Indian Telegraph) as modified up to 1st March 1905 | 5 a | (1 a) |
| Act II of 1886 (Income tax) as modified up to 1st April 1903 | 8 a | (1 a 6 p) |
| Act VI of 1886 (Births Deaths and Marriages Registration as modified up to 1st June 1891 | 6 a | (1 a) |
| Act XI of 1886 (Tramways) as modified up to 1st December 1903 | 9 a | (2 a) |
| Act XIII of 1886 (Securities) as amended by Act XII of 1891 | 2 a 9 p | (1 a) |
| Act VII of 1887 (Suits Valuation) as modified up to 1st October, 1904 | 1 a 9 p | (1 a) |
| Act IX of 1887 (Provincial Small Cause Courts) as modified up to 1st December 1906 | 6 a | (1 a) |
| Act XIV of 1887 (Indian Marine) as modified up to 15th February 1899 | 8 a | (1 a) |
| Act V of 1888 (Inventions and Designs) as modified up to 1st July 1903 | 9 a | (2 a) |
| Act I of 1889 (Metal Tokens) as modified up to 1st April 1901 | 1 a 9 p | (1 a) |
| Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903 | 5 a 6 p | (1 a) |
| Act XIII of 1889 (Cantonments) as modified up to 1st March 1895 | 7 a | (1 a) |
| Act XV of 18[illegible] (Official Secrets) as modified up to 1st April, 1904 | 3 a | (1 a) |
| Act IX of 18[illegible] (Railways) as modified up to 1st June 1[illegible]0 with an Index | Rs 1 2 | (2 a) |
| Act X of 18[illegible] (Press and Registration of Books) as modified up to 1st December 1903 | 2 a 3 p | (1 a) |
| Act XII of 1891 (Repealing and Amending Act) showing the Schedules as modified up to 31st May 1909 | 12 a | (1 a 6 p) |
| Act XIV of 1891 (Oudh Courts) as amended by the Oudh Courts Act (1891) Amendment Act 1[illegible] | 1 a 3 p | (1 a) |
| Act I of 18[illegible] (Land Acquisition) with footnotes | 7 a | (1 a) |
| Act VIII of 1[illegible] (Ta[illegible]) as modified up to 1st February 1906 | 9 a | (2 a) |
| Act IX of 18[illegible] ([illegible]) as amended by the Burma Laws Act, 1898 | 7 a 6 p | (1 a 6 p) |
| Act XI of 18[illegible] ([illegible]) as modified up to 1st March 1907 | 8 a | (2 a) |
| Act IX of 1897 (Provident Funds) as modified up to 1st April, 1903 | 1 a 6 p | (1 a) |
| Act V of 1898 (Code of Criminal Procedure as modified) up to 1st April, 1[illegible] | Rs 3 10 | (8 a) |
| Act II of 18[illegible] ([illegible]) as modified up to 1st March, 1907 | Rs 1 | (2 a) |
| Act XIX of 1[illegible] (Currency Conversion (Act v)? as amended by Act VII of 1[illegible] | 1 a | (1 a) |
| Act II of [illegible] as modified up to 1st [illegible] 1905 | 6 a 6 p | (1 a) |
| Act XV of 1[illegible] ([illegible]) as modified up to 1st December, 1904 | 5 a 0 p | (1 a) |

reference to the account of the amount of the mortgagee, that this case be struck off the file of pending cases without discussing any of the points at issues between the parties"

The claim was for Rs 10,000 including interest and was decreed by the court below.

The defendants appealed

Mr *A H C Hamilton* (with him Maulvi *Shafi uz zaman*) for the appellant —

The withdrawal of the money deposited under section 83 of the Transfer of Property Act, 1882, is subject to the conditions prescribed by that section, namely, that it should be accepted as in full discharge of the bond I rely upon *Ram Chandra* v *Keshobati Kumari* (1) and *Manzur Ali* v *Mahmud un nissa* (2) In any event, the plaintiffs are not entitled to interest on the principal amount from the date of deposit I rely upon *Anandi Ram* v *Dur Najaf Ali Begum* (3) The interest claimed is penal, see *Sunder Koer* v *Rai Sham Kishen* (4)

Certain questions of fact were also argued

Pandit *Baldeo Ram Dave* (for the Hon'ble Pandit *Sunder Lal*), for the respondent, was not called upon

STANLEY, C J, and BANERJI, J —This appeal arises out of a suit for sale upon a mortgage executed by the first two defendants in favour of the plaintiff on the 16th of December, 1886 The amount secured by the mortgage was Rs 1,300 It was stipulated in the mortgage deed that interest would be paid half yearly at the rate of 15 per cent per annum, and that in the event of interest not being paid every half year compound interest should be charged at the same rate The defendants 1 and 2 are the mortgagors The defendants 3, 4, and 5 are the sons and grandsons of the mortgagors The other defendants are purchasers of a part of the mortgaged property It was alleged on behalf of the defendants that a sum of Rs 600 had been paid in addition to the amount which the plaintiff admitted having received It was also urged that the mortgage had been discharged in full, inasmuch as the mortgagee had received a sum of Rs 2,725, which was deposited by the purchaser under section 83 of the Transfer of Property Act

(1) (1909) 6 A L J 617, s c 36 Calc, 840
(2) (1902) I L R 25 All 155
(3) (1890) I L R 13 All 195
(4) (1906) I L R 34 Calc 150

| | |
|---|---|
| Act V of 1861 (Police) as modified up to 7th March 1903 | In Urdu. 2a 9p (1a) |
| Ditto ditto | In Nagri. 2a 9p (1a) |
| Act XVI of 1861 (... ges) as modified up to 1st February 1898 | In Urdu 1a 3p (1a) |
| Ditto ditto | In Nagri 1a 3p (1a) |
| Act III of 1861 (F... nes) as modified up to 1st September 1906 | In Urdu 1a (1a) |
| Ditto ditto | In Nagri 1a (1a) |
| Act III of 18.5 (G... res) as modified up to 31st May 1903 | In Urdu 9p (1a) |
| Ditto ditto | In Nagri 9p (1a) |
| Act III of 186. (Gambling) as modified up to 1st December 1896 | In Nagri 1a 3p (1a) |
| Ditto ditto 1st January 1905 | In Urdu. 1a (1a) |
| Act V 1869 (Indian Articles of War) as modified up to 1st January, 1899 | In English, Urdu and Nagri. Bound. Rs 3 (5a) |
| Ditto ditto | Unbound Rs 2-8. (5a) |
| Act VII of 1870 (Court fees) as modified to 1st December 1896 | In Urdu 8a 3p (2a 6p) |
| Ditto 1st October 18.. | In Nagri 8a 9p (1a) |
| Act I of 1871 (Cattle trespass) as modified up to 1st December 1903 | In Urdu. 1a 9p (1a) |
| Ditto ditto | In Nagri 1a 9p (1a) |
| Act XXIII of 1871 (Pensions) | In Urdu 9p (1a) |
| Ditto | In Nagri. 9p (1a) |
| Act IV of 1872 (Punjab Laws) as modified up to 1st November 1904 | In Urdu 2a 6p (1a 6p) |
| Act IX of 1872 (Contract) as modified up to 1st September 1899 | In Urdu 9a 9p (3a) |
| Ditto ditto | In Nagri 9a 6p (3a) |
| Act XV of 1872 (Christian Marriage) as modified up to 1st April 1891 | In Urdu 4a (2a) |
| Ditto ditto | In Nagri 4a (2a) |
| Act V of 1873 (Government Savings Bank) as modified up to 1st April 1903 | In Urdu 9p (1a) |
| Ditto ditto | In Nagri 9p (1a) |
| Act VIII of 1873 (Northern India Canal and Drainage) as modified up to 1st July 1899 | In Urdu 3a 3p (1a) |
| Ditto ditto | In Nagri 3a 3p (1a) |
| Act X of 1873 (Oaths) as modified up to 1st February 1903 | In Urdu 1a (1a) |
| Ditto ditto | In Nagri 9p (1a) |
| Act XVI of 1873 (... P... Police ... P... ) | In Urdu 1a (1a) |
| Act IX of 1874 (... Vagrancy) | In Urdu 2a (1a) |
| Act IX of 18.. (L... ity) as modified up to 1st May 1906 | In Urdu 3p (1a) |
| Ditto ditto | In Nagri 3p (1a) |
| Act XI of 1876 (Presidency Banks) as modified up to 1st March, 1906 | In Urdu 3a 9p (1a 6p) |
| Ditto ditto | In Nagri 3a 6p (1a 6p) |
| Act XVII of 1876 (Oudh Laws) | In Urdu 2a (1a) |
| A... (... ) as modified up to 1st February 1904 | In Urdu 4a 6p (1a 6p) |
| Ditto ditto | In Nagri 4a 6p (1a 6p) |
| A... as ... up to 1st December 1890 | In Nagri 1a 6p (1a) |
| [illegible] ... up to 1st ... 1903 | In Urdu 4a (1a 6p) |
| Ditto | In Nagri 4a (1a 6p) |
| A... XI ... | In Urdu 2a (1a) |
| Ditto | In Nagri 2a (1a) |
| A... XVI ... | [illegible] 2a (1a) |
| Ditto | [illegible] (1a) |
| A... [illegible] | In [illegible] |
| Ditto ditto | In Nagri [illegible] |

The only other contention, on behalf of the appellants, is that the stipulation to pay compound interest must be deemed to be a penalty We are unable to accede to this contention, which in our opinion is wholly untenable

1909

HAR DAYAL v. PIRTHI SINGH

These are the points raised in this appeal, and we are of opinion that none of them has any force We accordingly dismiss the appeal with costs We extend the time for payment of the mortgage money for a period of six months from this date

*Appeal dismissed*

---

1909 December 10

*Before Sir John Stanley, Knight Chief Justice, and Mr Justice Banerji*

TIKA RAM (DEFENDANT) v DAULAT RAM (PLAINTIFF) *

*Suit to set aside a decree on the ground of fraud—Personal service not effected—Conduct of plaintiff*

The mere fact that personal service of a summons has not been effected on a defendant will not render the proceedings against him absolutely abortive But where the non service is due to the fraudulent conduct of the plaintiff in the suit and others acting with him and a decree is thereby obtained, such decree may be set aside as fraudulent *Mahomed Gulab* v *Mahomed Sulaiman* (1) followed

THE facts of the case were as follows —

Tika Ram, the defendant appellant, obtained an *ex parte* decree against the plaintiff, Daulat, from the Court of Small Causes at Agra When execution of the decree was taken out the plaintiff instituted the present suit to set it aside on the ground of fraud It was alleged in the plaint that the suit in which the *ex parte* decree was obtained had been instituted at the instigation of one Jhundu Mal, who was an enemy of the plaintiff, and that the claim of the defendant had been fraudulent and that no summons had been served upon the plaintiff The Munsif, holding that the claim of the defendant was false and that no summons had been served upon the plaintiff in that suit, set aside the *ex parte* decree On appeal the District Judge did not go into the fact whether the claim of the defendant against the plaintiff was fraudulent or not He simply found that the service of the summons, which purported to have been made on the person of the plaintiff, was fictitious,

---

* Second Appeal No 855 of 1908 from a decree of B J Dalal District Judge of Agra, dated the 10th of August 1908, confirming a decree of Shambhu Nath Dube Munsif of Agra, dated the 9th of August 1907

(1) (1894) I L R 21 Calc 619

| | |
|---|---|
| Act VI of 1888 (Debtors) .. | In Urdu 6 *p* (1 *a*) |
| Ditto | In Nagri 6 *p* (1 *a*) |
| Act I of 1889 (Metal Tokens) as modified up to 1st April 1904 | In Urdu 6 *p* (1 *a*) |
| Ditto ditto | In Nagri 6 *p* (1 *a*) |
| Act II of 1889 (Measures of Length) | In Urdu 3 *p* (1 *a*) |
| Ditto | In Nagri 3 *p* (1 *a*) |
| Act IV of 1889 (Merchandise Marks) as modified up to 1st February 1904 | In Urdu 1 *a* 9 *p* (1 *a*) |
| Ditto ditto | In Nagri 2 *a* (1 *a*) |
| Act VI of 188[illegible] (Probate and Administration) | In Urdu 6 *p* (1 *a*) |
| Ditto | In Nagri 6 *p* (1 *a*) |
| Act VII of 1889 (Succession Certificate) as modified up to 1st December 1903 | In Urdu 1 *a* 9 *p* (1 *a*) |
| Act XIII of 1889 (Cantonments) as modified up to 1st March 1895 | In Nagri 3 *a* (1 *a* 9 *p*) |
| Act XV of 1889 (Official Secrets) as modified up to 1st April 1904 | In Urdu 9 *p* (1 *a*) |
| Ditto ditto | In Nagri 9 *p* (1 *a*) |
| Act XVI of 1889 (Central Provinces Land Revenue) | In Urdu 1 *a* 6 *p* (1 *a*) |
| Ditto ditto | In Nagri 1 *a* 6 *p* (1 *a*) |
| Act XX of 1889 (Lunatic Asylums Amendment) | In Urdu 3 *p* (1 *a*) |
| Act I of 1890 (Revenue Recovery) | In Urdu 3 *p* (1 *a*) |
| Act II of 1890 (Amending Acts XVII of 1864, X of 18[illegible], II of 1874 and V of 18[illegible]1) | In Urdu (3 *p*) (1 *a*) |
| Act V of 1890 (Indian Forest and Burma Forest Amendment) | In Urdu (6 *p*) (1 *a*) |
| Act VI of 1890 (Charitable Endowments) as modified up to 1st August 1903 | In Urdu 6 *p* (1 *a*) |
| Act VIII of 1890 (Guardians and Wards) | In Urdu 2 *a* 3 *p* (1 *a* 9 *p*) |
| Act IX of 1890 (Railways) as modified up to 1st June 1905 | In Urdu 8 *a* (2 *a*) |
| Ditto as modified up to 1st May 18[illegible]6 | In Nagri 8 *a* (2 *a*) |
| Act X of 1890 (Press and Registration of Books Amendment) | In Urdu 3 *p* (1 *a*) |
| Act XI of 1890 (Prevention of Cruelty to Animals) | In Urdu 6 *p* (1 *a*) |
| Act XIX of 1890 (Salt Amendment) | In Urdu 3 *p* (1 *a*) |
| Act XX of 1890 (North-Western Provinces and Oudh) | In Urdu 1 *a* (1 *a*) |
| Act X of 1891 (Indian Criminal Law Amendment) | In Urdu 3 *p* (1 *a*) |
| Act XIV of 1891 (Oudh Courts) | In Urdu 6 *p* (1 *a*) |
| Act XVIII of 1891 (Bankers' Books Evidence) as modified by Acts I of 1893 and XII of 1900 | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 6 *p* (1 *a*) |
| Act II of 1892 (Christian Marriage Validation) | In Urdu 3 *p* (1 *a*) |
| Act IV of 1892 (Bengal Courts of Wards Amendment) | In Urdu 6 *p* (1 *p*) |
| Act VI of 1[illegible] ([illegible] Act and Civil Procedure Code Amendment) | In Urdu 3 *p* (1 *a*) |
| Act IV of 1893 (Partition) | In Urdu 3 *p* (1 *a*) |
| Act I of 1894 (Land Acquisition) | In Urdu [illegible] *a* 3 *p* (1 *a* 6 *p*) |
| Ditto | In Nagri 1 *a* 6 *p* (1 *a* 6 *p*) |
| Act III of 1894 (Criminal Procedure and Penal Codes Amendment) | In Urdu 3 *p* (1 *a*) |
| Act V of 1894 (Civil Procedure Code Amendment) | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (1 *a*) |
| Act VIII of 1894 ([illegible]) as modified up to 1st October 1903 | In Urdu 4 *a* (1 *a*) |
| Ditto ditto | In Nagri 3 *a* 3 *p* (2 *a*) |
| Act IX of 1894 ([illegible]) | In Urdu [illegible] *a* 3 *p* (1 *a*) |
| Ditto | In Nagri [illegible] 3 *p* (1 *a*) |
| Act XII of 1894 ([illegible] Laws Act Amendment) | In Urdu 3 *p* (1 *a*) |
| Ditto | In Nagri 3 *p* (1 *a*) |
| [illegible] (Mechanical [illegible]) | In Urdu 3 *a* (1 *a*) |

The only other contention, on behalf of the appellants, is that the stipulation to pay compound interest must be deemed to be a penalty. We are unable to accede to this contention, which in our opinion is wholly untenable.

1909

HAR DAYAL v. PIRTHI SINGH.

These are the points raised in this appeal, and we are of opinion that none of them has any force. We accordingly dismiss the appeal with costs. We extend the time for payment of the mortgage money for a period of six months from this date

*Appeal dismissed.*

---

1909 December 10.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

TIKA RAM (DEFENDANT) v. DAULAT RAM (PLAINTIFF).*

*Suit to set aside a decree on the ground of fraud—Personal service not effected—Conduct of plaintiff.*

The mere fact that personal service of a summons has not been effected on a defendant will not render the proceedings against him absolutely abortive But where the non-service is due to the fraudulent conduct of the plaintiff in the suit and others acting with him, and a decree is thereby obtained, such decree may be set aside as fraudulent *Mahomed Gulab* v. *Mahomed Sulaiman* (1) followed.

THE facts of the case were as follows:—

Tika Ram, the defendant appellant, obtained an *ex parte* decree against the plaintiff, Daulat, from the Court of Small Causes at Agra. When execution of the decree was taken out the plaintiff instituted the present suit to set it aside on the ground of fraud. It was alleged in the plaint that the suit in which the *ex parte* decree was obtained had been instituted at the instigation of one Jhundu Mal, who was an enemy of the plaintiff, and that the claim of the defendant had been fraudulent and that no summons had been served upon the plaintiff The Munsif, holding that the claim of the defendant was false and that no summons had been served upon the plaintiff in that suit, set aside the *ex parte* decree On appeal the District Judge did not go into the fact whether the claim of the defendant against the plaintiff was fraudulent or not. He simply found that the service of the summons, which purported to have been made on the person of the plaintiff, was fictitious,

---

* Second Appeal No 855 of 1908 from a decree of B J. Dalal, District Judge of Agra, dated the 10th of August, 1908, confirming a decree of Shambhu Nath Dube, Munsif of Agra, dated the 9th of August, 1907.

(1) (1894) I. L. R., 21 Calc., 619.

| | |
|---|---|
| Act XII of 1899 (Currency Notes Forgery) ... ... | ... In Nagri 3 p (1 a) |
| Act XIV of 1899 (Tariff Amendment) ... ... | ... In Urdu 3 p (1 a) |
| Ditto ... | .. In Nagri 3 p (1 a) |
| Act XVII of 1899 (Indian Registration Amendment) ... | ... In Urdu. 3 p (1 a) |
| Ditto .. | .. In Nagri 3 p (1 a) |
| Act XVIII of 1899 (Land Improvement Loans Amendment) ... | .. In Urdu 3 p (1 a) |
| Ditto ... | ... In Nagri 3 p (1 a) |
| Act XX of 1899 (Presidency Banks) ... ... | ... In Urdu. 3 p (1 a) |
| Ditto | ... In Nagri 3 p (1 a) |
| Act XXI of 1899 (Central Provinces Tenancy Amendment) ... | ... In Urdu 3 p (1 a) |
| Ditto ditto | ... In Nagri. 3 p (1 a) |
| Act XXIV of 1899 (Central Provinces Court of Wards) ... | ... In Urdu. 1 a 3 p (1 a) |
| Ditto ditto | ... In Nagri 1 a 3 p (1 a) |
| Act I of 1900 (Indian Articles of War Amendment) ... | .. In Urdu. 3 p. (1 a) |
| Ditto ditto | ... In Nagri 3 p (1 a) |
| Act IV of 1900 [Indian Companies (Branch Registers)] ... | .. In Urdu 3 p. (1 a) |
| Ditto ditto ... | .. In Nagri 3 p (1 a) |
| Act IX of 1900 (Amendment of Court-fees Act, 1870) ... | ... In Urdu 3 p (1 a) |
| Ditto ditto ... | ... In Nagri. 3 p. (1 a) |
| Act X of 1900 (Census) ... .. ... | ... In Urdu. 9 p (1 a) |
| Ditto ... | ... In Nagri 9 p (1 a) |
| Act II of 1901 [Indian Tolls (Army)] ... | ... In Urdu 6 p (1 a) |
| Ditto ditto ... | ... In Nagri. 9 p (1 a) |
| Act V of 1901 [Indian Forest (Amendment)] ... ... | ... In Urdu 3 p (1 a) |
| Ditto ditto .. | ... In Nagri 3 p (1 a) |
| Act VI of 1901 (Assam Labour and Emigration) .. | ... In Urdu. 5 a (2 a) |
| Ditto ditto | In Nagri 5 a (2 a) |
| Act VII of 1901 (Native Christian Administration of Estates) .. | . In Urdu 3 p (1 a) |
| Ditto ditto . | .. In Nagri 3 p (1 a) |
| Act VIII of 1901 (Mines) ... .. ... | . In Urdu. 1 a (1 a) |
| Ditto ditto ... | ... In Nagri 1 a (1 a) |
| Act IX of 1901 ... .. | In Urdu 3 p (1 a) |
| Ditto ditto | . In Nagri 3 p (1 a) |
| Act X of 1901 . .. ... ... .. | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act II of 1902 [Cantonments (House Accommodation) ... | ... In Urdu 1 a. (1 a) |
| Ditto ditto | ... In Nagri. 1 a (1 a) |
| Act IV of 1902 (Indian Tramways) . .. ... | . In Urdu 3 p. (1 a) |
| Ditto | ... In Nagri 3 p. (1 a) |
| Act V of 1902 (Administrators General and Official Trustees) | In Urdu 3 p (1 a) |
| Ditto ditto | ... In Nagri. 3 p (1 a) |
| Act VII of 1902 [United Provinces (Designation)] .. | . In Urdu. 3 p (1 a) |
| Act VIII of 1902 (Indian Tariff) . ... .. | In Urdu 3 p (1 a) |
| Ditto | .. In Nagri 3 p (1 a) |
| Act II of 1903 [Indian Post Office (Amendment)] . | ... In Urdu 3 p. (1 a) |
| Ditto | ... In Nagri 3 p. (1 a) |
| Act III of 1903 (Electricity) ... . | . In Urdu 2 a. 0 p (1 a 0 p) |
| Ditto . | ... In Nagri 2 a (1 a 6 p) |
| Act VII of 1903 (Works of Defence) .. | . In Urdu 1 a 3 p (1 a) |
| Ditto . | In Nagri 1 a 3 p (1 a) |
| Act VIII of 1903 (Probate and Administration) ... | .. In Urdu 3 p (1 a) |
| Ditto . .. | . In Nagri. 3 p (1 a) |
| Act IX of 1903 (Tea Cess) ... ... .. | In Urdu 3 p (1 a) |
| Ditto . .. ... | .. In Nagri 3 p (1 a) |
| Act X of 1903 ([illegible]) ... ... ... | .. In Urdu 3 p (1 a) |
| Ditto ... ... ... . | In Nagri 3 p (1 a) |

1909

TIKA RAM v. DAULAT RAM.

and persons acting in collusion with him It was represented in the Small Cause Court that there was personal service of the summons upon Daulat Ram, and evidence was given to prove the alleged personal service As a matter of fact neither personal nor other service was effected, and the defendant Daulat Ram was wholly ignorant of the proceedings. Both the lower courts have found that these proceedings on the part of the appellant were fraudulent It is contended before us that the mere fact that personal service was not effected would not render the whole proceedings fraudulent This no doubt is the case. The mere fact that personal service of a summons has not been effected upon a defendant would not render the proceedings against him absolutely abortive, but where the non-service was as has been found here, due to the fraudulent conduct of the plaintiff in the suit and others acting with him, and a decree was thereby obtained, such decree may be set aside as fraudulent. That is what has been found in this case. The learned District Judge points out that not merely was there no personal service, but that the endorsement of service of the serving officer was false, and falsely procured by the appellant He further finds that there was not, either in his court or in the lower court, any evidence whatever that the claim of the appellant in the Small Cause Court was a genuine one. The appeal has been ably argued by the learned vakil who represents the appellant, but we are unable to accede to his argument. The principle upon which cases of this kind rest is stated by PETHERAM, C J, in the case of *Mahomed Gulab* v *Mahomed Sulaiman* (1). The learned Chief Justice there observes —"The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and the decree may be set aside by a Court of Justice in a separate suit" (See also *Abdul Majumdar* v. *Mahomed Gazi Choudhry* (2) We, therefore, dismiss the appeal with costs

*Appeal dismissed*

(1) (1894) I L R 21 Calc 612, at 619 (2) (1894) I. L. R, 21 Calc, 605

| | |
|---|---|
| Proceedings of the Council of the Governor General of India for making Laws and Regulations from July 1882 to 1 [illegible] Super royal 4to Annual subscription Rs 5 (Re 1) single issue [illegible], including postage | |
| Chronological Table of the Indian Statutes compiled under the orders of the Government of India by F G Wigley of the Inner Temple Barrister at Law Edition 1901 | Rs 4 (10 a) |
| Index of [illegible] Statutes Chronological Table and Index of the Indian Statutes compiled under the orders of the Government of India by F G Wigley of the Inner Temple, Barrister at Law Edition 1897 Two volumes | Rs 12 Reduced to Rs 8 (Re 1) |
| A Digest of Indian Law Cases containing High Courts Reports 1862—1900 and Privy Council Reports of Appeals from India 1836—1900 with an Index of cases compiled under the orders of the Government of India by J V Woodman of the Middle Temple Barrister at Law, and Advocate of the High Court Calcutta In six volumes Super royal 8vo Rs 72 for cloth bound. Reduced to Rs 36 per set and Rs 78 for quarter bound. Reduced to Rs 39 per set | (Rs 3 12) |
| Single volumes reduced to Rs 7 when sold separately for the first five volumes and Rs 5 for the sixth | |
| A Digest of the Statutes and Acts relating to Merchant Shipping in India Edition 1884 By T A Pearson Barrister at Law | Rs 5 Reduced to Rs 3 (12 a) |
| List of General Rules and Orders under Statutes and General Acts in force in British India corrected up to 30th June 1905 | Re 1 8 (2 a 6 p) |
| Addenda and Corrigenda List 1 of 1905 to the above | 2 a 6 p (1 a) |
| Index to Act V of 1869 (Indian Articles of War) as modified up to 1st January 1895 | 7 a (2 a) |
| Ditto ditto | In Urdu and Nagri 7 a (2 a) |
| Contents to ditto | In Urdu and Nagri 1 a 9 p (1 a) |
| The Baluchistan Agency Forest Law, 1890 | In Urdu 2 a (1 a 6 p) |
| The Quetta Municipal Law 1896 | In Urdu 3 a 3 p (1 a 6 p) |
| The Baluchistan Agency Criminal Justice Law 1896 | In Urdu 9 p (1 a) |
| The Baluchistan Agency Civil Justice Law, 1896 | In Urdu 2 a 0 p (1 a) |

| | |
|---|---|
| Proceedings of the Council of the Governor General of India for making Laws and Regulations, from July, 1882 to 1905 Super royal 4to Annual subscription Rs. 5 (Re. 1); single issue 4a, including postage. | |
| Chronological Tables of the Indian Statutes compiled under the orders of the Government of India, by F. G Wigley, of the Inner Temple, Barrister at-Law Edition 1901 | Rs 4 (10 a) |
| Index to Indian Statutes Chronological Tables and Index of the Indian Statutes, compiled under the orders of the Government of India, by F. G Wigley of the Inner Temple, Barrister-at-Law. Edition 1897. Two volumes . ... ... ... | Rs. 12 Reduced to Rs 6 (Re 1) |
| A Digest of Indian Law Cases containing High Courts' Reports, 1862—1900, and Privy Council Reports of Appeals from India 1836—1900, with an Index of cases compiled under the orders of the Government of India, by J. V. Woodman, of the Middle Temple, Barrister-at-Law, and Advocate of the High Court, Calcutta. In six volumes Super royal 8vo. Rs. 72 for cloth bound. Reduced to Rs. 36 per set and Rs 78 for quarter bound. Reduced to Rs 39 per set. ... | (Rs 3 12) |
| Single volumes reduced to Rs 7 when sold separately for the first five volumes and Rs 5 for the sixth | |
| A Digest of the Statutes and Acts relating to Merchant Shipping in India, Edition 1894. By T. A. Pearson, Barrister at-Law. .. | Rs 5 Reduced to Rs 3 (12 a |
| List of General Rules and Orders under Statutes and General Acts in force in British India corrected up to 30th June, 1905 . ... | Re 1-8 (2 a 6 p) |
| Addenda and Corrigenda List No. 1 of 1905 to the above ... ... | 2 a 6 p, (1 a) |
| Index to Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895 ... ... ... ... | 7 a. (2 a) |
| Ditto ditto ... | In Urdu and Nagri. 7 a (2 a |
| Contents to ditto .. ... ... ... .. | In Urdu and Nagri. 1 a. 9 p (1 a) |
| The Baluchistan Agency Forest Law, 1890 ... .. . | In Urdu, 2 a (1 a 6 p) |
| The Quetta Municipal Law, 1896 . ... ... . | In Urdu. 3 a 3 p. (1 a 6 p) |
| The Baluchistan Agency Criminal Justice Law, 1896 ... .. | In Urdu, 9 p (1 a) |
| The Baluchistan Agency Civil Justice Law, 1896 ... ... | In Urdu. 2 a 6 p (1 a) |

VOL. XXXII.] [PART IV.



# THE INDIAN LAW REPORTS,

APRIL 1910.

(Pages 147 –186 )

## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY

Privy Council ... J. V WOODMAN, *Middle Temple.*

High Court, Allahabad ... W K PORTER, *Gray's Inn.*



ALLAHABAD

PRINTED BY F LUKER, SUPERINTENDENT, GOVERNMENT PRESS, AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT, UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

Price, Re 1.

# BOOKS AND PUBLICATIONS FOR SALE

BY THE

# SUPERINTENDENT OF GOVERNMENT PRINTING, INDIA

8 HASTINGS STREET, CALCUTTA

*All books published by the Superintendent of Government Printing, India can be purchased either directly or through the following or any other booksellers —*

AGENTS

CALCUTTA—*Thacker, Spink & Co*
MADRAS—*Higginbotham & Co*
BOMBAY—*Thacker & Co, Ld*; *Radhabai Atmaram Sagoon*

NOTICE.—*Books required for private use only can be purchased Application should be accompanied by a remittance unless it is wished that the books should be sent by value payable post, in which case, besides the ordinary postage, an additional charge will be made for registration and commission*

*Books required for the Public Service should be obtained through Local Governments*

---

*The amounts within parentheses are for packing and postage*

---

## List of Books and Publications for sale which are less than two years old

---

## LEGISLATIVE DEPARTMENT.

---

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No 8 Hastings Street, Calcutta ]

THE PRICES OF THE GENERAL ACTS LOCAL CODES, MERCHANT SHIPPING DIGEST INDEX TO ENACTMENTS AND THE DIGESTS OF INDIAN LAW CASES, 1904 TO 1907 (SEPARATELY AND PRICE OF FIVE VOLUMES) HAVE BEEN CONSIDERABLY REDUCED

THE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPARTMENT

---

### I —THE INDIAN STATUTE BOOK

REVISED EDITION

*Super royal 8vo cloth lettered*

#### B —GENERAL ACTS

| | | |
|---|---|---|
| General Acts of the Governor General of India in Council, Vol I, from 1834 to 1867, Edition 1909 .. | Rs 6 | (10a) |
| General Acts of the Governor General in Council, Vol II, from 1868 to 1878 Edition 1909 .. | Rs 7 | (10a) |
| General Acts of the Governor General in Council, Vol III, from 1879 to 1886 Edition 1909 .. | Rs 6 | (9a) |
| General Acts of the Governor General in Council, Vol IV from 1887 to 1897 Edition 1909 .. | Rs 6 | (9a) |
| General Acts of the Governor General in Council Vol V, from 1898 to 1903 Edition 1909 .. | Rs 6. | (9a) |

Volume VI is in the Press

#### C —LOCAL CODES

The Bengal Code Third Edition 1905 containing the Regulations and Local Acts in force in Bengal Vols I to V Rs 6 a volume or

| | |
|---|---|
| Act I of 1872 (Evidence) as modified up to 1st May 1908 | Re 1 (2 a) |
| Act IX of 1872 (Contract) as modified up to 1st February 1908 | Re 1 4 a (2 a) |
| Act I of 1878 (Opium) as modified up to 1st October 1907 | 5 a 6 p (1 a) |
| Act VI of 1878 (Treasure Trove), as modified by Act XII of 1891 as reprinted on the 14th February, 1908 | 2 a 9 p (1 a) |
| Act VIII of 1878 (Sea Customs), as modified up to 1st June 1908 | Rs 1 8 3 (4 a) |
| Act XI of 1878 (Arms), as modified up to 1st October, 1908 | 6 a (1 a) |
| Act XVI of 1879 (Transport of Salt), as modified up to 1st October 1907 | 1 a 6 p (1 a) |
| Act XVIII of 1881 (Central Provinces Land revenue) as modified up to 1st March 1909 | 1 a 12 (3 a) |
| Act IV of 1884 (Explosives) as modified up to 1st September, 1908 | 4 a 9 p (1 a) |
| Act III of 1888 (Police) as modified up to 1st January 1909 | 1 a 9 p (1 a) |
| Act II of 1889 (Measures of Length with footnotes) | 1 a 3 p (1 a) |
| Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st August 1908 ... .. | 6 a (1 a) |
| Act VI of 1889 (Probate and Administration), as modified up to 1st January, 1909 | 2 a 9 p (1 a) |
| Act VI of 1890 (Charitable Endowments) (as modified up to 1st August, 1908 | 2 a 6 p (1 a) |
| Act XI of 1890 (Prevention of Cruelty to Animals) with foot notes | 3 a (1 a) |
| Act XIII of 1890 (Excise Malt Liquors), as modified up to 1st October 1908 | 1 a 6 p (1 a) |
| Act VIII of 1899 (Petroleum), as modified up to 1st January 1909 | 7 a (1 a) |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 ... .. | 2 a 6 p (1 a) |
| Act X of 1904 (Co operative Credit Societies) with reference to rules under the Act | 5 a 6 p (1 a) |

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED

Acts (Unrepealed) of the Governor General of India in Council from 1907 up to date

[Regulations made under the Statute 33 Vict, Cap 3 from 1907 up to date

The above may be obtained separately The price is noted on each]

## IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

| | | |
|---|---|---|
| Act XIII of 1857 (Opium) as modified up to 1st August 1908 .. | | In Urdu 9 p (1 a) |
| Ditto | ditto | In Nagri 9 p (1 a) |
| Act XXII of 1867 (Sarais and Paraos) as modified up to 1st August, 1908 | | In Urdu 6 p (1 a) |
| Ditto | ditto | In Nagri 6 p (1 a) |
| Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907 | | In Urdu 1 a 3 p (1 a) |
| Ditto | ditto | In Nagri 1 a 3 p (1 a |
| Act V of 1870 (Unclaimed Deposits) as modified up to 1st October 1908 ... | | In Nagri 3 p (1 a) |
| Act I of 1872 (Evidence), as modified up to 1st May 1908 | | In Urdu 8 a (2 a) |
| Ditto | ditto | In Nagri 8 a (2 a) |
| Act I of 1878 (Opium), as modified up to 1st October, 1907 .. .. | | In Urdu 1 a 6 p (1 a) |
| Ditto | ditto | In Nagri 1 a 6 p (1 a) |
| Act XIII of 1889 (Cantonments), as modified up to 1st October 1907 | | In Urdu 3 a (1 a 6 p) |
| Act XII of 1896 (Excise), as modified up to 1st March 190[illegible] | | In Urdu 2 a 9 p [illegible] |
| Ditto | ditto | In Nagri 3 a 3 p |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February, 1908 ... | | In Urdu 9 p (1 |

A Digest of Indian Law Cases, containing the High Court Reports and Privy Council Reports of Appeals from India 1904, with an Index of cases, compiled under the orders of the Government of India, by C. E. Grey Bar at Law Edition 1907 Rs 5 Reduced to Rs 1 4 0 per copy ... (6 a)

Ditto ditto 1905 by C E Grey, Bar at Law, Edition 1907 .. . Rs 5 Reduced to Rs 1-4 0 per copy (6 a)

Ditto ditto 1906 by C E Grey Bar at-Law, Edition 1908 Reduced to Rs 1 4-0 per copy (6 a)

Ditto ditto 1907 by B D Bose Bar at Law Edition 1908 . Reduced to Rs 1 4 0 per copy (5 a)

(Set of Digests from 1901—1907 Reduced to Rs 10 per set of 5 volumes)

General Rules and Orders made under enactments in force in British India consisting of General Rules Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index In three Volumes Rs 15 Reduced to Rs 10 per set (Rs 2) or Rs 5 per Vol (12 a)

Title page and Contents of the Acts passed by the Governor General of India in Council in the year 1907 .. . .. 1 a 6 p (1 a)

## NOTICE TO SUBSCRIBERS.

In order that an opportunity may be afforded of investigating the cause of the non-delivery of any Part or Parts of the "Indian Law Reports, Allahabad Series," to subscribers, it has been found necessary to give notice that no complaint can be attended to regarding the loss of any Part or Parts unless information be forwarded to the Superintendent, Government Press, Allahabad, within three months after the date of publication: after that date back numbers can be supplied only on full prepayment and not at the reduced rate of Re. 0-5-9 per copy.

# TABLE OF CASES REPORTED

PAGE.

## PRIVY COUNCIL.



## APPELLATE CIVIL.



## REVISIONAL CRIMINAL.

# TABLE OF CASES CITED

had stated that he had received the money on account of the mill. The receiver disallowed the amount, and the Subordinate Judge on the 30th May, 1907, held that the claim was barred by time. A final decree was made for distribution of the assets realised by the receiver among the share holders.

The plaintiffs appealed.

Dr. *Satish Chandra Banerji* (with him the Hon'ble Pandit *Sundar Lal*), for the appellants submitted that the claim was not barred by time, because the loan had been advanced for the firm to the managing member who had acknowledged a subsisting liability well within three years of the date of the application to the receiver. The receiver was an officer of the court and no creditor could sue him without the leave of the court. The partnership assets were in *custodiâ legis*, and the proper course for a creditor was to apply to the court or the receiver. The assets available for distribution among the shareholders could not be ascertained till the liabilities of the firm had been discharged. In taking accounts, the debit and credit entries had to be tested and adjusted; Woodroffe *Receivers*, pp 86, 132.

Babu *Surendra Nath Sen* (with him Munshi *Gobind Prasad* and Babu *Binode Behari*), for the respondents, contended that the manager of the firm was not an agent "duly authorized in this behalf" within the meaning of section 19 of the Limitation Act: The law contemplated an express authority given for the purpose of making an acknowledgment, and this had not been shown by the plaintiffs in the present case. The words "duly authorized in this behalf" are words of limitation and must be construed to mean a specially authorized agent. They should not be treated as though they were a surplusage; *Vittalshah* v. *Sheodin* (1) (cited in Sanjiva Row's "Lawyers' Companion," 635.)

RICHARDS and TUDBALL, JJ.—This appeal arises out of a suit brought for the dissolution of a partnership alleged to have existed between the plaintiffs and the defendants 1 to 4. It was subsequently held that a number of other persons were also partners and they were made parties accordingly. The plaintiffs suggested in their plaint that they were entitled not only to a dissolution of partnership but also to the repayment of the

(1) 2 C. P. L. R., 4[illegible].

# INDEX.

PAGE.

ACTS—1871—XXIII (PENSIONS ACT), SECTION 6—*Certificate giving court jurisdiction to try suit—Sanad, construction of—Grant of soil of village not a grant of land revenue—Non-production of certificate at time of institution of suit—Grant on payment of quit rent*] A village, portion of the subject of a suit for partition, was granted to the ancestor of the parties by Maharaja Scindia of Gwalior in 1861, and the grant was confirmed in 1866 by the British Government in a sanad which declared that the village in question "shall be continued to the grantee ... lands, allowances ... heirs shall con- ... ay Rs. 800 to Gov- ... sanad there was a guarantee against any further payment by the holder "on account of Imperial Land Revenue beyond the amount specified," and a declaration that the village and its holder "shall be liable for any local taxation which may be imposed on the district generally."

*Held* (affirming the decision of the High Court) that the sanad was not a grant of Land Revenue but of the soil of the village itself, and therefore the Pensions Act (XXIII of 1871) did not apply: but, even if it did, the Subordinate Judge had rightly held that an order made by the Revenue Court referring the plaintiff (respondent) to a suit in the Civil Court was equivalent to a certificate under section 6 ... ficate under section 6 of ... ion of a suit for which ... the maintenance of the ... obtaining the certificate ...

Ganpat Rao *v.* Anant Rao, I. L. R., 32 All. .. .. 148

——1877—III (INDIAN REGISTRATION ACT), SECTION 33—*Registration—Presentation of document by agent holding a power of attorney—Authentication of power*] A document ...

Chhuttan Lal *v.* Shiam Prasad, I. L. R., 32 All. .. 179

————XV (INDIAN LIMITATION ACT), SCHEDULE II, ARTICLES 134, 148—*Mortgage—Redemption by one mortgagor—Nature of possession—Subsequent sale under another mortgage decree—Suit by another representative of mortgagor for redemption—Limitation*] G, in 1850, mortgaged certain property and died, leaving a son, a daughter, and a widow. The son obtained a decree for redemption of the whole, which was sold to M H, G M, and A, who redeemed the mortgage. After the passing of this decree G's son and widow mortgaged

at the time the court made its decree On the first point it was argued that the agent must have express authority to give the acknowledgment, and that it is not enough that the Court should be satisfied that Lala Babu Prasad had authority to borrow and repay money, but that the Court must also be satisfied that each one of the partners gave express authority to Lala Babu Prasad to acknowledge the debt We think that this would be placing a very narrow construction on section 19 and would open the door to very serious fraud It seems to us that if it is admitted that the agent had a power to borrow, it follows of necessity that he had power to acknowledge the debt by either immediately giving a promissory note, or subsequently upon an adjustment of accounts, or in any other way in the course of business making *bonâ fide* admissions in writing We are quite satisfied on the evidence that Lala Babu Prasad was the manager of the firm with full power to borrow and repay money.

As to the next point, namely, that the debt was barred at the date of the judgment of the learned Subordinate Judge, we find that the claim was put forward on the 22nd of June, 1906 the Receiver having been appointed on the 14th of March in the same year It is quite clear, therefore, that from the date of the appointment of the Receiver and the putting forward of the claim the debt was not barred It was a part of the duty of the Court in the course of the suit to discharge the debts and liabilities of the firm, and in our judgment the mere fact that the Court did not adjudicate on the claim until after the expiration of more than three years, did not render the claim a bad claim against the assets of a firm which were being administered by the Court, and we think the learned Judge was wrong in dismissing the claim

It has not been ascertained what is the amount due to the plaintiffs in respect of the item we have been dealing with We
erefore allow the appeal to this extent that we hold that the
urt below was wrong in dismissing the plaintiffs' claim on
ground of limitation as to the item of Rs 7,509-11 6 The
e will go back to the Court below with directions to ascertain
t sum is due to the plaintiffs in respect of the said item
ng ascertained the amount due, the Court will allow the
the plaintiffs as creditors, and the balance of the assets

TUDBALL, J.—Five persons—Raj Karan, Baldeo, Golai, Ram Nandan and Bansdeo—have been bound over by the District Magistrate of Mirzapur to be of good behaviour. The record of the case has been submitted to this Court by the Sessions Judge with a recommendation that the Magistrate's order be set aside. It appears that these five persons, together with three others, were sent up for trial on a charge of dacoity. The District Magistrate found that the evidence was insufficient. An attempt was made to obtain evidence sufficient for a conviction under section 400, Indian Penal Code, but that evidence was not forthcoming. Thereupon, as the police information gave the District Magistrate reason to believe that it was necessary to bind over some of the persons to be of good behaviour, he took proceedings against these five persons out of the eight. An order under section 112 was duly passed and duly communicated to them. The evidence for the prosecution was taken in their presence and they were allowed an opportunity of producing evidence in their defence, which they did. The Sessions Judge has remarked:—"It has been held by the Calcutta High Court in *Alep Pramanik* v. *King Emperor* (1) that proceedings under section 110 of the Code of Criminal Procedure should not be instituted with a view to bind down persons on an indefinite charge after prosecutions against them on definite charges under the Indian Penal Code, have failed." This quotation apparently has been taken from the head note of the report. A perusal of the judgment however, will show that the Calcutta High Court laid down no such rule at all. The facts of that case are entirely different, and the High Court found that the proceedings taken against the accused were malicious proceedings taken by a Magistrate who had certainly laid himself open to very severe criticism. They further found that the evidence in that case was perfectly worthless. The facts in the present case are very different indeed. The evidence for the prosecution, if true, discloses a state of affairs which makes it absolutely necessary that the five men in question be bound over to be of good behaviour. The order of the District Magistrate appears to be a perfectly good and valid one, and I see no cause for interference. Let the record be returned.

(1) (1905) 11 C. W. N. 413.

charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239. In the present case the accused, according to the evidence, is charged with making five series of alterations Under section 234, the accused might have been tried at one trial for three offences, but they must have been committed within the space of twelve months from the first to the last. It cannot be contended that section 235 applies, or the provisions of section 236 or section 239. In the case of *Subrahmania Ayyar* v. *King-Emperor* (1) it was held by the Privy Council that the joining of charges contrary to the provisions of the Code of Criminal Procedure was not merely an irregularity which could be remedied by section 537. In the case of *Queen Empress* v. *Mati Lal Lahiri* (2) a Bench of the Calcutta High Court held that a charge framed as the present charge was quite irregular. It seems to me under the circumstances that I have no option except to direct a retrial of the case A proper charge must be framed in accordance with the Code of Criminal Procedure It should be borne in mind that I do not decide that evidence of the alleged falsifications other than those actually charged is inadmissible. I accordingly set aside the conviction and sentence passed on the appellant and direct that the Sessions Judge of Mainpuri do proceed as soon as he reasonably can to re-try the appellant after framing charges. I further direct that the appellant may be admitted to bail upon giving security to appear at his trial to the satisfaction of the District Magistrate.

(1) (1901) I. L. R., 25 Mad., 61. (2) (1899) I. L. R., 25 Calc., 560.

and persons acting in collusion with him. It was represented in the Small Cause Court that there was personal service of the summons upon Daulat Ram, and evidence was given to prove the alleged personal service. As a matter of fact neither personal nor other service was effected, and the defendant Daulat Ram was wholly ignorant of the proceedings. Both the lower courts have found that these proceedings on the part of the appellant were fraudulent. It is contended before us that the mere fact that personal service was not effected would not render the whole proceedings fraudulent. This no doubt is the case. The mere fact that personal service of a summons has not been effected upon a defendant would not render the proceedings against him absolutely abortive, but where the non-service was, as has been found here, due to the fraudulent conduct of the plaintiff in the suit and others acting with him, and a decree was thereby obtained, such decree may be set aside as fraudulent. That is what has been found in this case. The learned District Judge points out that not merely was there no personal service, but that the endorsement of service of the serving officer was false, and falsely procured by the appellant. He further finds that there was not, either in his court or in the lower court, any evidence whatever that the claim of the appellant in the Small Cause Court was a genuine one. The appeal has been ably argued by the learned vakil who represents the appellant, but we are unable to accede to his argument. The principle upon which cases of this kind rest is stated by PETHERAM, C. J., in the case of *Mahomed Gulab* v. *Mahomed Sulaiman* (1). The learned Chief Justice there observes:—"The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and the decree may be set aside by a Court of Justice in a separate suit." (See also *Abdul Majumdar* v. *Mahomed Gazi Chowdhry* (2). We, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

(1) (1894) I. L. R., 21 Calc., 612, at 619. (2) (1894) I. L. R., 21 Calc., 605.

priority over the claims of the aforesaid persons except Ram Narayan He has valued the appeal at Rs 2 296-5-0, the amount due under their decrees and has paid a court fee of Rs 10 on the memorandum of appeal

"I beg to submit that a suit for recovery of mortgage debt by enforcement of the hypothecation lien is a suit for money and, the suit not having changed its character in appeal, the court fee is payable *ad valorem* The object of the appeal is the recovery of the mortgage-debt from the sale proceeds of the property held in deposit in court in precedence of the defendants respondents That being so a court fee of Rs 140 is payable Rupees 10 having been paid, there is therefore a deficiency of Rs 130 to be made good by the plaintiff appellant on this memorandum of appeal."

Mr *M L Agarwala*, for the appellant, preferred the following objections :—

"The appellant has obtained a decree to enforce his mortgage to the full extent of his debt, the reservation being that certain creditors had perfected their title under section 295 of Act XIV of 1882 and had priority over the appellant's claim The object of the appeal is to get rid of this reservation The appeal seeks a declaration only Hence Rs 10 is quite sufficient."

The office put up the following report :—

"In reply to the objection I submit that the allegations on which the plaintiff came into court and the contention put forward by him in the court below were exactly similar to what is now contended for by the learned counsel on his behalf and yet he, the plaintiff, chose to bring a suit for money instead of for declaration The question is, can he change the nature of suit in appeal? I submit, not The relief prayed for in the plaint was directed against the mortgagor as also the creditors including the respondents to this appeal other than Ram Narayan the attaching creditor The sale-proceeds of a major portion of the mortgage security were deposited in court and the plaintiff wanted to have the same for the satisfaction of his mortgage-debt against the rival claims of other creditors, the present respondents being some of them That object of the plaintiff having failed there as against the respondents, he comes in appeal to this Hon'ble Court with the same object in view, but to evade the payment of proper institution fee he argues that he wants a declaration only, and that his object in appealing is the removal of the condition attached to the decree by the court below. If the decree of the court below is allowed to stand, he will be a loser to the extent of the respondents' claim against the sale proceeds, the other property mortgaged to him being insignificant and not sufficient to discharge his whole debt under the mortgage sued upon (vide paragraph 8 of the plaint)

"I may mention that the plaintiff appellant presumably claims to come under Art 17, cl vi Sch II of Act No VII of 1870. That clause applies to a case where it is not possible to put a money valuation to the relief claimed, which is not the case here According to the plaintiff himself the value of the subject matter in dispute in the appeal is Rs 2,236, and I submit the court fe must be paid on this amount"

1909

GANPAT RAO v ANANT RAO

produced at the time of its institution, that the defect was not one which could be cured by obtaining such a certificate at a later stage of the proceedings, that the High Court should not have allowed the respondent to withdraw the suit with regard to the village of Mahur, as to which he had been unable to obtain a certificate, with leave to bring a fresh suit, but should have dismissed the suit *with respect to that portion of the property*, and that in regard to the village of Warur Buzurg the High Court was in error in deciding that on the construction of the sanad under which that village was held it was not a grant of land revenue, but a grant of the right to the soil to the grantee subject to certain conditions, and that the Pensions Act did not apply to it Reference was made to the Pensions Act, section 3, as to the interpretation of the words "grant of revenue or money" and section 6 Bombay Regulation XXIX of 1827, "Report of the Inam Commission," Bombay 1871, by Col A T Etheredge, C S I, page 4, paragraphs 10 and 11, "Hand book for Revenue officers in the Presidency of Bombay" by A K Nairne, B C S 1872, Chapter XXIII, pages 341, 343 and 345, *Ram Chandra Mantri* v *Venkatrao* (1), *Muhammad Azmat Ali Khan* v *Lalli Begum* (2), *Adrishappa* v *Gurushidappa* (3) *Sultan Sani* v *Ajmodin* (4) and "The land System of British India" by Baden Powell, Vol III, "Inam Tenures," page 140

*Ross* for the respondent contended, mainly for the reasons there given, that the judgment of the High Court was correct

*DeGruyther, K C*, replied

16*th December* 1909 —The judgment of their Lordships was delivered by LORD COLLINS —

The question in this case is as to the respective rights of certain members of the family of one Jagdeo Rao, who was Commander in Chief of the Maharaja Scindia, of Gwalior, at the time of the Indian Mutiny, in respect of certain villages and lands situate part in Bombay and part in the N W Provinces, an interest in which was conferred upon him by the British Government in perpetuity as a reward for his services subject

(1) (1882) I L R 6 Bom 598 (602 603, 606)

(2) (1881) I L R 8 Calc 422 (434) L R 9 I A, 8 (20)

(3) (1880) I L R 4 Bom 494 L R, 7 I A 162

(4) (1893) I L R 17 Bom 431 L R, 20 I A 50

The following judgment was delivered by

TUDBALL, J.—This matter has come before me in the following circumstances. A memorandum of appeal was filed on a Court Fee Stamp of Rs. 10. The officer, whose duty it was to see that the proper fee was paid, reported that there was a deficiency of Rs. 130. This report of his was contested on behalf of the appellant, and this difference having arisen the matter was placed before the Taxing Officer. The latter, on the 12th of August last, passed an order under section 5 of the Court Fees Act, holding that there was a deficiency and the amount of fee had been correctly estimated by the office. In some manner which is not apparent from the record, the papers were laid before Mr. Justice GRIFFIN, who thereupon ordered the matter to be placed before the Taxing Judge for orders. Mr. *Wallach* has appeared on behalf of the Crown and takes a preliminary objection that the order of the Taxing Officer was a final order as contemplated by section 5 of the Court Fees Act. Attention has been called to the rulings reported in I. L. R., 15 All., 117 and I. L. R., 12 All., 129. In view of those rulings and of the clear terms of the section there is no doubt in my mind, whatsoever, that the Taxing Officer's order is final and that I have no further power to interfere in the matter. It is urged by Mr. *Agarwala* on behalf of the appellant that the dispute was one as to the category within which the suit falls and that therefore the order is not a final order. But the decision as to the category is the preliminary point which has to be decided before a decision as to the amount of Court Fees can be arrived at. According to the plain language of section 5, the amount fixed by the Taxing Officer, no matter how he arrives at his conclusion, is fixed finally and is binding so far as the purposes of the Court Fees Act are concerned. Attention has been directed to section 12 of the Act, and it has been urged that a decision of a court as to the category within which a suit may fall is not a final decision contemplated by section 12, and the same principle applies to section 5 of the Act. With this I cannot agree. The language of section 12 is perfectly clear. It is merely the decision of a court as to valuation, not the category, which is final, whereas in section 5 it is the decision of the Taxing Officer as to

allowed" They then go on — "As regards the three villages in the Jhansi District, the objection which was raised in the grounds of appeal is that the property was subject to the provisions of the Pensions Act, No XXIII of 1871, and that no certificate was obtained under section 6 of that Act before the institution of this suit, and so the Court had no jurisdiction to try the case That defect, if any, has been cured This Court allowed the hearing of the appeal to be adjourned in order to enable the respondent to procure a certificate and so avoid the necessity of disposing of the technical question raised in regard to it The result is that the appeal in respect of the three Jhansi villages fails"

They then deal with that part of the 440 acres in respect of which partition was allowed, and agree with the Subordinate Judge's decision, which is one of fact, thereon Therefore, on this point also, the appeal failed.

They then deal with the respondent's objections First, that the village of Mahur should not have been excluded from the decree in favour of the plaintiff, as it was not covered by section 6 of the Pensions Act On this point they allow the plaintiff to abandon his suit as regards that village, with liberty, if so advised, to institute a fresh suit in regard to it The only exception as to this was that the terms as to costs were too easy upon the plaintiff But the matter was clearly in the discretion of the Court in view of the circumstances to which they refer

The next relates to the village of Warur Buzurg, as to which the learned Subordinate Judge had held that though it came within the section 6 of the Pensions Act the want of a certificate was sufficiently met by the order above referred to The High Court, without expressing any opinion on that point, held that the sanad by which the British Government, on 1st December, 1866, confirmed the land to Jagdeo Rao was not a grant of land revenue but of the soil of the village itself, and consequently that the Pensions Act did not apply

Their Lordships are not disposed to differ from the two Judges of the High Court on a question of construction, particularly as it seems to them that the learned Subordinate Judge, for the reasons he gave, was fully justified in treating the order as

mahals, known by the name of Mahal Muhammad Makki, sold the same to the defendants. The plaintiff thereupon brought the present suit for pre emption The plaintiff had no interest in the mahal sold, but was the owner of one of the other mahals into which the village had been divided At the time of partition no fresh wajib ul arz was framed The existing wajib-ul arz contained a chapter on pre emption headed "Rights of co sharers amongst themselves," and gave a right of pre-emption, first to co sharers in the *khata*, next to proprietors of the *patti* and finally to proprietors of the village (*malikan deh*) The Court of first instance (Subordinate Judge of Jaunpur) held that the plaintiff was entitled to pre empt as "*malik deh*," and gave her a decree accordingly The defendants appealed to the High Court

The Hon'ble Pandit *Sundar Lal* (with him Maulvi *Muhammad Ishaq*), for the appellants

Mr *B E O'Conor* (with him Babu *Jogindro Nath Chaudhri*), for the respondent

STANLEY, C J —This appeal arises out of a pre emption suit The village of Arand prior to 1888 consisted of one mahal which was divided into *thoks* and *pattis* On the 17th of April 1888, partition proceedings were filed and the village was partitioned A number of mahals were formed, one of which, namely, Mahal Muhammad Makki, is the subject matter of this litigation The plaintiff is not a co sharer in this mahal, but is a co-sharer in another mahal The owners of Mahal Muhammad Makki sold the entire mahal to the defendants and therefore the suit was instituted No new wajib-ul arz was framed at the time of partition, but the plaintiff relies upon the wajib ul-arz which was prepared in the year 1883, which contains the following provision as to pre emption, namely, "if any co sharer in any *patti* wishes to transfer his property, then he shall do so first of all to his co-sharer in the *khata*, next to the proprietors of the *patti*, after that to the proprietors of the village (*malikan deh*)" The contention on behalf of the plaintiff is that no new wajib ul arz having been framed upon the recent partition, the provisions of the old wajib-ul-arz must prevail and that the plaintiff being proprietor (*malik*) of part of the village is entitled to pre-empt

1909

EMPEROR v. BALDEO SINGH

Rs 5, in that he was in possession of certain empty cartridge cases, which had already been used for firing The Officiating Sessions Judge of Mainpuri has referred the case to this Court, because in his opinion such empty cartridge cases do not fall within the definition of ammunition in section 4 of the Arms Act The only ground which he gives for his opinion is a Punjab Ruling to be found at page 134 of Hawkins' Arms Act (2nd edition) I cannot possibly agree with the opinion expressed by the Officiating Sessions Judge of Mainpuri It requires but the insertion of a percussion cap to make a cartridge case fit for future use Gun wads are specifically included within the definition of ammunition, and to hold that cartridge cases were not part of ammunition would in my opinion lead to an absurdity This point was considered by a Bench of the Bombay High Court in *King Emperor* v *Ibrahim Alibhoy* (1) It was there held that an empty cartridge case fell within the definition of ammunition I fully agree with the opinion expressed therein The case is not one which calls for any interference by this Court as the fine imposed is a small one Let the record be returned

*Record returned*

---

1909
*December 7*

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain*

EMPEROR v RAM PIYARI *

*Criminal Procedure Code sections 345 (2) and 439—Revision—Power of High Court in revision to give leave to compound*

*Held* that the High Court can in the exercise of its powers of revision under section 439 of the Code of Criminal Procedure give leave for the composition of an offence under section 325 of the Indian Penal Code

THIS was a reference made by the Additional Sessions Judge of Aligarh recommending that a compromise should be allowed in a case in which one Musammat Ram Piyari had been convicted under section 325 of the Indian Penal Code and sentenced to one month's simple imprisonment

The reference coming in the first instance before Richards, J, was referred to a Bench of two Judges under the following order —

This is a reference from the Additional Sessions Judge of Aligarh suggesting that a compromise might be accepted in a certain criminal case I may

---

* Criminal Reference No 673 of 1909

(1) (1905) 7 Bom., L. R. 474

The words *mahlan deh* which appear in that clause bear, in my opinion, the same meaning as the words *hissadaran deh* in the wajib ul arz which formed the subject of consideration by a Full Bench in *Dalganjan Singh* v *Kalka Singh* (1) I am unable to distinguish this case from the case above mentioned As held in that and other cases, the decision of each case depends on the nature of the particular custom or contract on which it is founded The ruling in *Janki* v *Ram Partap Singh* (2), to which I was a party, has been relied on by the Court below, apparently under the impression that it was held in that case that in every instance the owner of a share in one mahal is entitled to pre empt a share in another mahal No such general rule was laid down in that case, which was decided with reference to its own peculiar circumstances The wajib ul arz relied on in that case was prepared after the village had been divided into two mahals. Having regard to that circumstance it was held that when the wajib ul arz conferred on a share holder in the village the right of pre emption, it was clearly intended that the right would attach to such a share holder, even though he was not a co sharer in the same mahal Those circumstances are absent in the present case The custom recorded in the wajib ul arz relied on in this case cannot after partition apply to the altered state of things which has now come into existence I agree in the order proposed

BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the Court below is set aside and the plaintiff's suit is dismissed with costs in both Courts

*Appeal decreed*

(1) (1899) I L R, 22 All, 1 (2) (1905) I L R, 28 All, 286

section 423 did not exist as a portion of the Code of Criminal Procedure. In any case we are satisfied that we have the power. We grant the leave. The petition of composition when accepted by the court below will have the effect of an acquittal of the accused.

1909

EMPEROR v. RAM PIYARI.

*Application allowed.*

## APPELLATE CIVIL.

1909
*December 16.*

*Before Mr Justice Sir George Knox and Mr. Justice Karamat Husain.*

DAL SINGH (PLAINTIFF) v. MUSAMMAT DINI (DEFENDANT).*

*Succession—Hindu Law—Unchastity of widow no bar to her right of succession to her son.*

There is no authority for holding that a Hindu lady who after her husband's death has waited and then gone to live with another man is thereby excluded from inheritance to the estate left by her son.

THE facts of this case were as follows:—

On the death of Bhuri Singh, a separated Hindu, his estate was claimed by his mother, Musammat Dini. Her claim was resisted by Dal Singh, uncle of Bhuri Singh, on the ground that Musammat Dini, having become unchaste, was debarred from inheriting the property of her son. The court of first instance found in favour of Musammat Dini, on the ground that her unchastity had not been established. The lower appellate court came to the conclusion that she had become unchaste, but that it was after the death of her husband; and, holding that the disqualification on the ground of unchastity applied only to the case of a widow claiming the estate of her husband and not to a mother claiming the estate of her son, confirmed the decree in her favour. The plaintiff appealed

Munshi *Govind Prasad* (with him Mr. *M. L. Agarwala*), for the appellant :—

An unchaste woman is disqualified, under the Hindu Law, from inheriting. The ruling in *Musammat Ganga Jati* v. *Ghasita* (1) relied on by the lower court does not apply to the

* Second Appeal No. 601 of 1908 from a decree of Mubarak Husain, Subordinate Judge of Shahjahanpur, dated the 25th of March, 1908, confirming a decree of Kherod Gopal Banerji, Munsif of Tilhar, dated the 12th of September, 1907.

(1) (1875) I. L. R., 1 All., 46.

dismissed the suit for arrears of rent brought by the lessor, holding that during the period for which rent was claimed the lessees were out of possession This finding was in accordance with the result of the litigation which ended in the decree of the 30th of September, 1904 From the decree passed in the suit brought by the lessor an appeal was preferred to the District Judge The appeal prevailed and the suit of the plaintiff lessor was decreed Upon second appeal to this Court the decision of the lower appellate Court was set aside and the case was remanded to that Court After remand the learned Judge adhered to his original decision and decreed the claim of the lessor The defendants (lessees) appealed to the High Court

Mr *B E O'Conor* and Munshi *Haribans Sahai*, for the appellants

Munshi *Govind Prasad*, for the respondents

BANERJI and TUDBALL, JJ —The question in this appeal is whether the suit of the plaintiff respondent is barred by the rule of *res judicata*. The facts are these —On the 15th of November, 1899, a lease was granted by Indar Sahai, plaintiff, who is the zamindar of the village, to Ajudhia Prasad and Mathura Prasad, the predecessors in title of the appellants The lessees alleging that they had been dispossessed, brought a suit for recovery of possession and compensation, and obtained a decree on the 25th of March, 1903 They obtained formal possession on the 4th of September, 1903 but were again dispossessed and thereupon they brought another suit on the 4th of March, 1904, for recovery of possession and compensation This suit was decreed by the Court of first instance on the 30th of September, 1904, and the decree was affirmed in appeal Possession was delivered on the 19th of November, 1905 On the 4th of December, 1905, the lessor brought the suit which has given rise to this appeal, against the lessees for arrears of rent for the period from the 5th of March, 1904, to the 19th of November, 1905 On the 3rd of January, 1906 the lessees brought another suit for compensation for the same period that is for the period subsequent to the date of the institution of the suit brought by them on the 4th of March, 1904, to the date of delivery of possession namely the 19th of November, 1905 This suit was decreed by the Court of first

in the text of Yajnavalkya, he can show us no text which would authorize us to hold that a Hindu lady, who, after her husband's death, has taken to living with another man, is thereby excluded from inheritance to the estate left by her son The current of rulings in other Presidency High Courts is against the appellant and there are, in cases of our own Court, passages which point in the same direction There is no case, however, of this Court which exactly covers the point now in issue before us We have therefore to consider the text of Yajnavalkya, which is quoted as an *authority for the proposition*, together with the commentary of Narada on the same, and to see whether they contain sufficient authority for the plea raised We think they do not The text in question is to be found in the *Mitakshara*, chapter II, section X, sloka 140 the chapter which deals with the subject of inheritance The translation of this sloka given by Colebrooke runs as follows — An impotent person, an out caste and his issue, one lame, a mad man, an idiot a blind man, and a person afflicted *with an incurable disease, as well as others (similarly disqualified)* must be maintained, excluding them, however, from participation " The words " similarly disqualified " do not occur in the original, they are a gloss put upon the original text by the translator Even so, this text does not in express terms refer to a woman who is alleged to be unchaste as being excluded from inheritance She could only come, if she comes at all, under the word पाद्या ' others " The commentary of Vijnaneswara on this last word runs thus —' Under the term ' others ' are comprehended, one who has entered into an order of devotion, an enemy to his father, a sinner in an inferior degree and a person deaf, dumb, or wanting any organ Thus Vasistha says, ' They, who have entered into another order, are debarred from shares ' Narada also declares, ' an enemy to his father, an out caste, an impotent person, and one who is addicted to vice, take no shares of the inheritance even though they be legitimate Much less, if they be sons of the wife by an appointed kinsman " Even here again there is no direct allusion to unchastity It is not as if the idea of unchastity was absent from the learned commentator's mind, because the fact of unchastity is expressly alluded to in sloka 142 of Yajnavalkya, just two slokas below the particular sloka with

respondents, however, contends that the decision of the Rent Court in the suit of the lessees cannot be *res judicata* in the present suit, because in the present suit an appeal lay to the District Judge, whereas an appeal in the other suit lay to the Commissioner He has cited no authority in support of his contention In our judgment the fact that an appeal lay to the Civil Court from the decision of the Revenue Court in one of the suits and to the Commissioner in the other cannot affect the question of *res judicata* It is the competency of the court of first instance to entertain the two suits which regulates the application of the rule of *res judicata* The court of first instance, which was the Revenue Court, was competent to entertain both the suits which were tried by it and to adjudicate on the issues which arose in those suits. It held in one suit, on the issue whether the lessees, present appellants, were or were not in possession during the period for which compensation was claimed, that they were not in possession That decision having become final, the same issue could not be re opened in the other suit which the same court was also competent to try That the application of the rule of *res judicata* is irrespective of any provisions as to the right of appeal from the decision of the Court which decided the issue is manifest from the second explanation to section 11 of the new Code of Civil Procedure, which settles conflicting authorities on the point We are therefore of opinion that, as the issue which arises in this suit as to the possession of the appellants during the period for which arrears of rent are claimed was determined by a Court of competent jurisdiction and was decided against the plaintiffs, the matter has become *res judicata* and the same question could not be raised and reconsidered in the present suit. The learned Judge was therefore wrong in overruling the plea of *res judicata* We allow the appeal and setting aside the decree of the lower appellate Court restore that of the Court of first instance with costs in all Courts

*Appeal decreed*

1909

DAL SINGH v. MUSAMMAT DINI.

found to have been unchaste in her husband's lifetime, or of a widow inheriting her husband's property and taking with the property the duties involved in such inheritance Those cases have to be viewed possibly and probably from another standpoint other principles are involved

In this case the particular unchastity alleged and found is that some six or seven years after her husband's death the respondent eloped with a Brahman The appeal in this case has been to Narada, and it will not be amiss to see how the Rishi Narada looks upon such an act as the one attributed to the respondent The case is exactly one which he contemplates and on which he gives no uncertain pronouncement in his book XII, vv 97 to 101 They run as follows —

97 When her husband is lost or dead, when he has become a religious ascetic, when he is impotent, and when he has been expelled from caste these are the five cases of legal necessity, in which a woman may be justified in taking another husband

98 Eight years shall a Brahman woman wait for the return of her absent husband or four years, if she has no issue after that time, she may betake herself to another man

99 A Kshatriya womān shall wait six years or three years if she has no issue, a Vaishya woman shall wait four (years) if she has issue, any other Vaishya woman (i e one who has no issue) two years

100 No such (definite) period is prescribed for a Sudra woman whose husband is gone on a journey Twice the above period is ordained, when the (absent) husband is alive and tidings are received of him

101 The above series of rules has been laid down by the creator of the world for those cases where a man has disappeared No offence is imputed to a woman if she goes to live with another man after (the fixed period has elapsed)

In the light of the above texts it can hardly with any show of justice, we think, be pleaded that Musammat Dini is an सोपपातिका still less an अपपातता or an

Procedure. If the contention of the other side was sound, then whether, in a case like the present, justice was or was not obtained by the applicant would depend entirely upon accident. It would depend upon whether he was lucky enough to discover the evidence which was necessary to decide the case in his favour before the appeal was disposed of by the High Court or afterwards. The Legislature did not contemplate any period of limitation as applicable to applications for review of judgment, nor presumably, if this could be prevented, that justice should be defeated by chance.

STANLEY, C. J. and BANERJI, J.—This is an application for review of a judgment passed in a second appeal by a Bench of this Court, of which one of us was a member, on the 12th of December, 1907. The grounds on which a review of judgment is sought are that since the disposal of the appeal documentary evidence has been discovered which, if sufficiently proved, would have satisfied the Court below that a receipt for money relied on by it was a spurious receipt. It is needless to say that in second appeal the Court is bound to accept the findings of fact of the lower appellate Court, and that Court in this instance found that the receipt relied on was genuine. If on the hearing of the appeal this new evidence had been discovered, it might have been open to this Court to allow the appellant to withdraw the appeal with a view to apply to the lower appellate Court for a review of judgment on the ground of the discovery of fresh evidence. But, unfortunately for the appellant, the evidence was not discovered until some time had elapsed after the dismissal of the appeal. It appears to us to be clear that this Court, if the new evidence had been brought before us before judgment was delivered, could not have considered its weight, nor was it open to this Court to remand the case to the lower appellate Court with a view to the consideration of the documents alleged to have been recently discovered. Under the circumstances we think that the application for a review of judgment on the ground of the discovery of new evidence is clearly untenable. We are not disposed to think that any authority for this is necessary. But if such were required, we have it in two cases decided in the Calcutta and

Mal, who brought a suit for sale of the property against Ghulam Nabi, Shams ul nissa, and the aforesaid Muhammad Husain, Ghulam Muhi-ud-din, and Azim-ullah and obtained a decree against them on the basis of a compromise on the 22nd of September, 1886. In execution of this decree the property was sold and purchased by Said-ud din, Khadim Husain, Ali Husain, and Muhammad Husain, the appellants, on the 20th of April, 1891 Among the auction purchasers, Said-ud-din was the heir of Ghulam Muhi-ud-din and Khadim Husain and Ali Husain were the sons of Azim ullah Khan, Musammat Ashraf Begam, the daughter of the original mortgagor Ghulam Mustafa was a party to none of these transactions Ashraf Begam died, leaving a son, Ghias-ud-din, who assigned his interest in the mortgaged property to the plaintiff, Ratan Lal. Ratan Lal accordingly instituted the suit for redemption of the share of Ashraf Begam on the 19th of August, 1905 One of the defences raised was that the suit was barred by limitation Both the courts below held that it was not so barred On second appeal BANERJI, J, delivered the following judgment —

1909

SAID-UD-DIN KHAN v. RATAN LAL

"This appeal arises out of a suit for the redemption of a mortgage, and the only question raised is whether the claim is time-barred. The facts are these One Ghulam Mustafa Khan owned a five-biswa share in the village Rasulpur Mustafa, a similar share in Rustampur, and a ten biswa share in Nijabatpur On the 5th of September, 1850, he made a usufructuary mortgage of the above shares in favour of one Mohan Lal, who sub mortgaged the shares Ghulam Mustafa Khan died, leaving a son, Ghulam Nabi Khan, a daughter, Musammat Ashraf and a widow, Musammat Shams ul nissa On the 26th of February, 1872 Ghulam Nabi Khan obtained a decree for redemption of the mortgage mentioned above, against Mohan Lal and his sub-mortgagees That decree was sold by auction in 1875 and was purchased by one Meghraj Singh, who on the 9th of February, 1876, sold it to Muhammad Husain, Ghulam Muhi ud-din Khan and Azim ullah These persons paid off the amount of the mortgage, so that by discharging that mortgage they became absolute owners of the share of Ghulam Nabi, and as regards the share of Musammat Ashraf they stepped into the shoes of the original mortgagee and held her share as the representatives of a co-mortgagor who had redeemed the mortgage. In 1873 Ghulam Nabi and Shams ul nissa mortgaged certain shares in the three villages mentioned above to one Jauhari Mal, who on the 22nd of September, 1886, obtained a decree for sale and in execution of that decree caused the property mortgaged to him to be sold on the 20th of April, 1891 At the sale, Muhammad Husain, Said ud-din son of Muhammad Khan, and Ali Husain and Khadim Husain the representatives in interest of Azim ullah, became the purchasers and took possession and are still in possession. Ghias ud-din, son of

referring to the payment was inserted in the judgment. It in no way affects the judgment, nor could it in any way be regarded as *res judicata* so far as the rent was concerned for which the suit had been brought. Lest, however, there may be any misapprehension, we think it desirable to omit from the judgment altogether the words to which objection is taken. We accordingly direct that the words, "this payment it is found satisfied the rent payable up to the end of 1314F." be struck out. As the applicant has substantially failed, he must pay the costs of the application.

*Application for review dismissed.*

## REVISIONAL CRIMINAL.

*Before Mr Justice Sir George Knox and Mr. Justice Karamat Husain.*

EMPEROR *v* GHANSHAM SINGH *

*Criminal Procedure Code, section 195, clauses (1) (c), and (3)—Sanction to prosecute—Abetment of offences of forgery and personation committed not in the course of judicial proceedings*

The offence or offences in which section 195, clause (1), sub-clause (c), read with clause (3) of the Code of Criminal Procedure requires that sanction should be given by a court with respect of documents produced in Court must be offences committed by parties to the proceeding whether the offence be one of the substantive offences described in section 463 or punishable under sections 471, 475 or 476 of the Indian Penal Code or only amounts to abetment of any such offences.

THE facts of this case were as follows:—

One Mare Lal was a resident of the district of Muzaffarnagar, and Muhammad Hashim was a Hakim practising in Meerut. Muhammad Hashim and his wife, Musammat Amatunnain, owed some money to Mare Lal. In settlement of the debt, Mare Lal and his debtors entered into an agreement that Muhammad Hashim's wife should execute a sale-deed in respect of her property in favour of Mare Lal. In pursuance of that agreement Muhammad Hashim one day came to Mare Lal, accompanied by a woman who was represented by Muhammad Hashim to be his wife, and they all went to the Sub-Registrar's office to get the sale deed registered. Later on Mare Lal coming to know of the facts filed a complaint against Muhammad

*Criminal Revision No 393 of 1909, from an order of Ahmad Ali, Additional Sessions Judge of Meerut, dated the 13th of July 1909.

purchased only the interests of Ghulam Nabi and Shams-ul-nissa Ashraf Begam's interest remained unaffected She was a mortgagor and her representative could redeem the property within 60 years from the date of the execution of the mortgage bond The plaintiff was within time Article 148 of the second schedule of the Limitation Act, 1877, did apply The possession of the appellants was merely that of mortgagees They never set up title adverse to that of the plaintiff twelve years before the suit The principle of law which would govern the case is one of venerable antiquity—'once a mortgage always a mortgage' Moreover, the plaintiff could not claim possession so long as the usufructuary mortgage was not discharged, and in equity, as in law, time would not run against a person who was unable to act

KNOX and RICHARDS JJ—The only question in this Letters Patent Appeal is the following The predecessors in title of the defendants claimed through one Ghulam Nabi Ghulam Nabi was one of the heirs of Ghulam Mustafa Ghulam Mustafa had made a usufructuary mortgage in 1850 Ghulam Nabi without the other heirs redeemed the entire mortgage For many years the predecessors in title of the defendants were in possession under the redemption of Ghulam Nabi Some time about the year 1891 the predecessor in title of defendants purchased at auction sale the property now in dispute The auction sale was had in pursuance of a mortgage decree under the Transfer of Property Act and the property put up for sale was the property now in dispute The learned counsel for the appellants admits that but for this sale they would be in no better position than the mortgagee from Ghulam Mustafa and the suit would not have been barred by limitation But it is contended that when the defendants or their predecessors in title purchased the property in 1891 and got formal possession their title from that time must be referred to the auction purchase and not to their original title through Ghulam Nabi We think that the view taken by our learned brother was correct and the defendants' title must be referred to the original possession and not to the purchase in 1891. The appeal is dismissed with costs

*Appeal dismissed.*

the Court may exercise its right under section 476, there must be (1) a judicial proceeding (2) the offence committed must be one specified in section 195, and (3) the offence must be committed before the Court or brought under its notice It was submitted that all these essentials were present in the present case, and the Court, if it chose, could exercise its power under section 476, or delegate its powers to Mare Lal under section 195 Clause (c) of sub section 1 of section 195, no doubt laid down that the offence should have been committed by a party to a proceeding in any Court, but this clause read with sub section 3, amplified the scope Sub section 3 provided also for the abetment of the offence, specified in the sub section, but it did not say that the abettor should be a party to the proceedings against the principal offender The wording of the sub section was sufficiently wide to include abetment outside the Court The Counsel based his argument on the following authorities —*Abdul Khadar* v *Meera Saheb* (1), *In re Devji valad Bhavani* (2) *Queen Empress* v *Abdul Kadar* (3), *Chandra Mohan Banerji* v *Balfour* (4), *In re Bal Gangadhar Tilak* (5), *Profulla Chandra Sen* v *Emperor* (6), *Giridhari Marwari* v *Emperor* (7) *and Umrao Singh* v *King Emperor* (8).

Mr *G P Boys*, for the opposite party, submitted that clause (c) of sub section 1 of section 195 clearly limited the person privileged under section 195 to the party to any proceedings An abettor who was not a party to the proceedings could not take that benefit of the section The effect of sub section 3 was only to include a subordinate offence and not to extend the benefit of the section to a person who was not a party to the proceedings He relied on *Eadara Virana* v *The Queen* (9) *and John Martin Sequiera* v *Luja Bai* (10)

Mr *C C Dillon* replied

Knox and Karamat Husain, JJ —The facts out of which this application arises, so far as they are necessary for the determination of the point which we have to consider, can be very briefly stated

(1) (1892) I L R 15 Mad 224
(2) (1893) I L R 18 Bom 581
(3) (1890) I L R 20 Mad 8
(4) (1899) I L R, 26 Calc 859
(5) (1904) I L R, 26 Bom 785
(6) (1903) I L R 30 Calc 905
(7) (1908) 12 C W N, 822
(8) (1909) 6 A L J, 236
(9) (1881) I L R 3 Mad 400
(10) (1901) I L R, 25 Mad, 671.

were in his favour He commented upon the ruling in 25 All, 155, which was against him Under section 60 of the Transfer of Property Act, 1882, he submitted, a mortgagor could redeem the whole of the mortgaged property from one of the several mortgagees If he was not allowed to do so, one single transaction could be the subject of several litigations at the instance of each mortgagee

The question has to be determined on evidence whether the money was advanced by the mortgagees in specific shares There is nothing to show in the mortgage bond that the money was so advanced The mortgage was indivisible and one of the mortgagees could not bring a separate suit for his share in the mortgage debt unless he could obtain the consent of the mortgagor to that effect

Dr *Satish Chandra Banerji*, for the respondents, was not called upon

STANLEY, C J, and KNOX, J —This appeal arises out of a suit for sale on a mortgage under the following circumstances One Thakur Das executed a mortgage deed of the property in suit in favour of Chandi Prasad and Brij Mohan Lal on the 2nd of July, 1898, each of the mortgagees providing half of the advance On the 2nd of April, 1901, Thakur Das sold his equity of redemption in the mortgaged property to the mortgagee, Chandi Prasad, the amount of the purchase money being more than sufficient to satisfy the mortgage debt in full Brij Mohan Lal was no party to that transaction Chandi Prasad then sold the property to the appellants in this appeal The mortgagee, Brij Mohan Lal, whose share in the mortgage debt had not been satisfied, sold his mortgagee rights to the plaintiff respondent Rajjan Lal Rajjan Lal then brought the suit out of which this appeal has arisen for recovery by sale of the mortgaged property of the portion of the mortgage debt to which Brij Mohan Lal was originally entitled The main defence was that the mortgage was entirely satisfied by the sale to Chandi Prasad and that Brij Mohan had no right to maintain the suit This raises the question whether one of two mortgagees, who advanced the mortgage money equally, can give a good discharge for the entire mortgage debt without the consent of or reference to his co mortgagee It was decided in

*Before Mr. Justice Tudball.*

EMPEROR *v.* LALA AND OTHERS.*

*Act No XLV of* 1860 *(Indian Penal Code) section* 494—*Bigamy*—"*Person aggrieved*"—*Criminal Procedure Code, section* 198—*Procedure*—*Commitment.*

In a case of bigamy the person aggrieved is either the first husband or the second husband and not the father. Where a complaint was preferred by the father of the first husband, which resulted in a commitment on a charge under section 498 of the Indian Penal Code, it was *held* that the commitment was bad.

IN this case one Gobardhan filed a complaint in the Court of a Magistrate of the first class against two persons—Badam and Lala—to the effect that Badam's daughter was married to the complainant's son; that Badam had come to his house and taken away the girl and remarried her to Lala, and that on the complainant going to Lala's house, Lala prevented the girl from returning with him, though she was willing to do so. On these allegations Gobardhan preferred a charge under section 498 of the Indian Penal Code against Badam and Lala. The Magistrate added Musammat Nihalo, the daughter of Badam, as an accused person and committed all three to the Court of Session on a charge under section 494 of the Indian Penal Code. The Assistant Sessions Judge referred the case to the High Court upon the ground that there being no complaint by the "person aggrieved" the commitment was bad.

TUDBALL, J.—One Gobardhan filed a complaint in the Court of a first class Magistrate against Badam and Lala to the effect that Badam's daughter was married to Gobardhan's son; that Badam had come to Gobardhan's house and taken away the girl and remarried her to Lala; that on his going to Lala's house, Lala prevented the girl from returning with him, though she was willing to do so. On these allegations Gobardhan preferred a charge under section 498 of the Indian Penal Code against Badam and Lala. The Magistrate added Musammat Nihalo, the daughter of Badam, as an accused person and has committed all three for trial to the Court of Session on a charge of bigamy under section 494 of the Indian Penal Code. The learned Assistant Sessions Judge has referred the matter to this Court asking that the commitment might be quashed on the point of law that there is no

* Criminal Reference No. 444 of 1909.

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain* — 1909 December 23.

ASMA BIBI (PLAINTIFF) v ABDUL SAMAD KHAN (DEFENDANT)*

*Muhammadan Law—Dower—Present value of the dirham*

The money value of ten *dirhams* in India is something between three and four rupees *Sughra Bibi* v *Musa Bibi* (1) referred to

THIS was a suit by a Muhammadan wife to recover from her husband Rs 800 part of her dower of Rs 1,000, Rs 200 having been remitted The defence, *inter alia*, was that the dower was not Rs 1,000, but 10 *dirhams*. The court of first instance (Munsif of Fatehpur) gave the plaintiff a decree as claimed On appeal by the defendant, however, the District Judge reduced the amount of the decree to Rs 35, which he held to be the equivalent of 10 *dirhams* in current Indian money. The plaintiff appealed to the High Court

Babu *Surendra Nath Sen* for the appellant

Maulvi *Muhammad Ishaq* for the respondent.

KNOX and KARAMAT HUSAIN, JJ —The only point for determination in this appeal is the money value of 10 (ten) *dirams*, or *dirhams*, which has been found to be the dower of the plaintiff. The lower appellate court has fixed it at about Rs 35 (thirty five). The learned vakil for the plaintiff appellant contends that the money value of 10 (ten) *dirhams* is much more than Rs 35 He relies on the following remarks in *Sughra Bibi* v. *Musa Bibi* (1) —"But it would appear that we are not allowed to escape from a hopeless and helpless dilemma, for we are told that we must either give this pauper plaintiff Rs 51,000 or Fatima's portion of 10 (ten) *dirhams* amounting to Rs 107."

With due respect to the learned Judges who fixed the money value of 10 (ten) *dirhams* at Rs 107, we are unable to say that 10 (ten) *dirhams* amount to Rs 107.

A *dirham* is "a silver coin usually weighing from forty five to fifty grains, rather heavier than an English sixpence" Wilson's Glossary, p 143.

In a footnote to the *Hidayah* it is stated that the "value of the *dirm* is very uncertain Ten *dirms* according to

* Second Appeal No 920 of 1908 from a decree of J H Cuming District Judge of Cawnpore dated the 29th of July 1908 modifying a decree of Hamid Husain Munsif of Fatehpur, dated the 7th of March 1908

(1) (1877) I L R, 2 All., 573.

THE facts of this case were as follows —

On the 5th of February 1863, Ram Bakhsh mortgaged with possession ten biswas of a village to Debi Das, for Rs 7 700, the main stipulations of the mortgage being that the profits of the mortgaged property were to be set off against the interest of the mortgage money after deducting Rs 100 *malikana*, and that at the time of redemption arrears due from tenants and enhanced revenue, if any, were to be paid by the mortgagor but no interest on these items Zahur Ahmad Khan and his sons in 1866 and 1871 purchased an aggregate share of 9 biswas, 19½ biswansis from Ram Bakhsh, and the remaining ½ biswansi was purchased by the mortgagee Debi Das After Zahur Ahmad Khan's death, his share was inherited by his widows sons and daughters These sons in 1877 brought a suit to redeem Debi Das They were minors at the time and their mother acted as the next friend On the 25th of May, 1878, the suit was decreed by the court of first instance, the plaintiffs being required to pay Rs 6 967 1 4 to the mortgagee whose claim for arrears of rent and enhanced revenue was disallowed On the 12th of June 1878, Debi Das withdrew from court the money deposited to his credit by the plaintiffs and on the 17th of July the latter obtained possession over the mortgaged property Debi Das however, appealed and the appellate court awarded to him a further sum of Rs 8 956 12 11 on account of arrears and enhanced revenue, but disallowed interest on this amount and directed the plaintiffs to pay this amount within a month There was no provision in the decree as to foreclosure or sale in the event of failure to pay in the money The money was not paid in and Debi Das recovered possession from the plaintiffs on the 1st of April 1880 Then he applied for mesne profits and on the 31st of March 1881, the executing court made a decree for Rs 5,615 14 10 in his favour, being mesne profits for 1879 80, and costs In execution of this decree, on the 20th of August 1881, the mortgaged property was sold and purchased by the decree holder (mortgagee) The sale was duly confirmed, certain objections taken by the judgment-debtors thereto being disallowed and a certificate of sale was issued to Debi Das on the 11th of February, 1882, Zahur Ahmad's sons sold part of the property

1909

ASMA BIBI v. ABDUL SAMAD KHAN

فيستحب عند الشافعية والحنابلة ان لاينقص عن عشرة دراهم خروجا من خلاف ابي حنيفة و ان لايزيد علي خمسمائة درهم لصدقة بنات النبي صلى الله عليه وسلم و زوجاته و اما اصداق ام حبيبة اربعمائة دينار فكان من النجاشي اكراما له صلى الله عليه وسلم - قسطلانى شرح صحيح بخاري جلد هشتم صفحه ٣٨—٣٩ طبع نولكشور •

(c) It is stated in the account given of the marriage of Abu Jaafar, the second, that he said that Ali, son of Musa, proposed to marry Ommul Fazl, daughter of Abdullah Al Mamun and gave her as dower 500 (five hundred) genuine *dirhams*, which was the amount of dower of his great grandmother, Fatima Beharul Anwar, Vol X, p 33 Tehran edition

سياتي في تزويج ابي جعفر الثاني انه قال ان علي بن موسى خطب ام الفضل بنت عبدالله المامون و بذل لها من الصداق مهر جدته فاطمة وهو خمسمائة درهم جياد - بحارالانوار جلد عاشر صفحه ٣٣ طبع طهران •

(d) This is the Messenger of God He has given his daughter Fatima to me in marriage on (a dower of) 500 (five hundred) *dirhams*. I have accepted it Ye should ask him (if that is so) and be witnesses (1)

هذا رسول الله زوجنى ابنته فاطمة عليها السلام على خمسمائة درهم و قد رضيت فاسئلوه و اشهدوا - بحارالانوار جلد عاشر صفحه ٣٥ طبع طهران •

(e) The Prophet gave Fatima in marriage to Ali Her dower according to one report was 480 *dirhams* according to another it was 400 (four hundred) mithqal of silver. according to a third report it was 500 (five hundred) *dirhams*, and this is the most authentic report

في خبر زوج النبي فاطمة عليها على اربع مائة و ثمانين درهما وروى ان مهرها كان اربعمائة مثقال فضة وروي انه كان خمسمائة درهم وهو الاصح - بحارالانوار جلد عاشر صفحه ٣٦ طبع طهران •

(f) It is reported from Abu Salmah, "I asked Aisha—'What was the Prophet's dower?' "The dower fixed by him", she said, "for his wives, was 12 (twelve) *auqiyahs* and a *nush*." She said: "Do you know what a *nush* is?" I said "No." She said, "It is one half of an *auqiyah* and thus it (the dower) amounts to 500 (five hundred) *dirhams*"

(1) This is a portion of the speech reported to have been made by Ali on the occasion of his marriage with Fatima

entitled to redeem, as their equity of redemption had never been sold; *Khiraj Mal* v. *Daim* (1)

The Hon'ble Pandit *Sundar Lal* (with him Babu *Durga Charan Banerji*, Maulvi *Ghulam Mujtaba* and Pandit *Mohan Lal Nehru*) for the respondents, distinguished the case in I. L. R., 22 Calcutta and contended that the additional amount allowed by the High Court was part of the mortgage money, and so long as it was not paid, the mortgagor's representatives were not entitled to possession of the mortgaged property. The mortgagee was therefore entitled to mesne profits and even if he obtained more than he was entitled to, it could not be said that the court acted without jurisdiction. The decree for mesne profits was obtained in open court after notice to the opposite party and the decree had become final. There was no fraud, and this decree could not be challenged after a quarter of a century. An examination of the plaintiff's sale-deeds showed that the shares of the daughters of Zahur Ahmad had not passed to him.

Dr. *Satish Chandra Banerji* in reply, submitted that the principle of the ruling of the Privy Council in I. L. R., 22 Calcutta applied. There the executing court had placed an erroneous construction on the decree and held that it awarded something to the decree-holder which, properly understood, the decree did not award. Here also the decree of the High Court had been misunderstood and the executing court had given in the guise of mesne profits what the appellate court had refused as interest. In neither case had the executing court jurisdiction to add to the decree or make a new decree.

STANLEY, C. J., and BANERJI, J.—This appeal arises in a suit for redemption of a mortgage, dated the 5th of February 1863, executed by one Ram Bakhsh in favour of one Debi Das in respect of a 10 biswa share of the village Lodhamai. The mortgage was usufructuary and it was provided in it that the profits were to be appropriated in lieu of interest, except a sum of Rs 100 per annum, which was to be paid *to the mortgagor*. There were other provisions in the mortgage which for the purposes of this appeal it is unnecessary to refer to. In 1866 Ram Bakhsh sold 7 biswas out of the 10 biswas, that is, his

(1) (1904) I. L. R., 32 Calc., 296, 312, 315.

1909

Amna Bibi v. Abdul Samad Khan

فستحب عندالشافعية والحنابلة ان لاتنقص عن عشرة دراهم خروجا من خلاف ابی حنيفة و ان لايزيد على خمسمائة درهم لصدقة بنات النبی صلى الله عليه وسلم و زوجاته و اما اصداق ام حبيبة اربعمائة دينار فكان من النجاشی اكراماله صلى الله عليه وسلم - قسطلانی شرح صحيح بخاري جلد هشتم صفحه ۳۸—۳۹ طبع نولكشور ٭

(c) It is stated in the account given of the marriage of Abu Jaafar, the second, that he said that Ali, son of Musa, proposed to marry Ommul Fazl, daughter of Abdullah Al Mamun and gave her as dower 500 (five hundred) genuine *dirhams*, which was the amount of dower of his great-grandmother, Fatima Beharul Anwar, Vol X, p 33 Tehran edition

سمانی فی تزويج ابی جعفرالثانی انه قال ان علی بن موسی خطب ام الفضل بنت عبدالله المامون و بذل لها من الصداق مهر جدته فاطمه وهو خمسمائة درهم جياد - بحارالانوار جلد عاشر صفحه ۳۳ طبع طهران ٭

(d) This is the Messenger of God He has given his daughter Fatima to me in marriage on (a dower of) 500 (five hundred) *dirhams* I have accepted it Ye should ask him (if that is so) and be witnesse (1)

هذا رسول الله زوجنی ابنته فاطمه عليها السلام على خمسمائة درهم و قدرضيت فاسئلوه و اشهدوا - بحارالانوار جلد عاشر صفحه ۳۵ طبع طهران ٭

(e) The Prophet gave Fatima in marriage to Ali Her dower according to one report was 480 *dirhams* according to another it was 400 (four hundred) mithqal of silver according to a third report it was 500 (five hundred) *dirhams*, and this is the most authentic report

فی مهر زوج النبی فاطمة عليها على اربع مائة و ثمانين درهما وروی ان مهرها كان اربعمائة مثقال فضة وروي انه كان خمسمائة درهم وهو الاصح - بحارالانوار جلد عاشر صفحه ۳۶ طبع طهران ٭

(f) It is reported from Abu Salmah, "I asked Aisha—'What was the Prophet's dower?' "The dower fixed by him", she said, "for his wives, was 12 (twelve) *auqiyahs* and a *nush*" She said. 'Do you know what a *nush* is?' I said "No" She said, "It is one half of an *auqiyah* and thus it (the dower) amounts to 500 (five hundred) *dirhams*"

---

(1) This is a portion of the speech reported to have been made by Ali on the occasion of his marriage with Fatima

namely, the three sons of Zahur Ahmad Khan, and the daughters of Zahur Ahmad Khan brought a suit to redeem the mortgage of 1863 That suit was dismissed by this Court in 1905 on the ground, among others, that the heirs of Debi Das had not been joined as parties to the suit On the 7th of September, 1905, Abdul Rashid, Abdul Aziz and Mahmud Khan sold to Parbhu Dayal a further one biswa share and on the 16th of January, 1909, Parbhu Dayal instituted the suit out of which this appeal has arisen for redemption of the mortgage of 1863.

The court below has dismissed the suit on the ground that the equity of redemption of the mortgagors had validly passed to the mortgagee Debi Das under the auction sale which took place in 1881 and that therefore the plaintiff acquired no right under his purchase to redeem the mortgage

The plaintiff has preferred this appeal It is not denied that if the equity of redemption was acquired by the mortgagee the plaintiff's suit must fail but it is urged by the learned advocate for the appellant that the Court had no jurisdiction to award mesne profits, that the auction sale held in 1881 for the realisation of the mesne profits so awarded was a nullity, and that the equity of redemption of the plaintiff's vendors did not pass to the mortgagee Debi Das This contention is based on the argument that the decree of the High Court varying that of the court below did not direct the award of mesne profits Reliance is placed on the terms of section 583 of the Code of Civil Procedure, 1882 We are unable to accede to the contention of the learned advocate In our opinion a decree of reversal by an appellate court contains, by necessary implication, a direction to the court below to cause restitution to be made of all the benefits of which the successful party in the appeal was deprived by the enforcement of the erroneous decree of the court of first instance As observed by SIR BARNES PEACOCK, C J in *Hurro Chunder Roy Chowdhry* v *Shoorodhonee Debia* (1), "it is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it A Court of appeal does not necessarily enter into the question whether a decree it is about to reverse has been executed or not"

(1) 9 W R., 402.

(2) A translation of this is to be found on p. 112, article 731 (125), of Tagore Law Lectures for 1891 92, Vol I, in which instead of 4,000 (four thousand) four hundred *dirhams* are mentioned This is undoubtedly wrong This wrong translation seems to have led Sir R Wilson to state in a foot note on p 119, 3rd edition of his Anglo Muhammadan Law, that "the dower settled by Mohamed on each of his many wives is said to have been five hundred or four hundred *dirhams* (Mishkat, p 101)" | 1909 ASMA BIBI v ABDUL SAMAD KHAN

According to the authorities cited the money value of 10 (ten) *dirhams* is something between Rs 3 and 4, and thus there is no substance in this appeal, which we dismiss with costs

*Appeal dismissed*

## REVISIONAL CRIMINAL

1910 January 5

*Before Mr Justice Sir George Knox and Mr Justice Piggott*

EMPEROR v RAMESHAR DAS *

*Act No II of 1899 (Indian Stamp Act) sections 27 64 (a)—Execution of document not containing statement of facts affecting duty—Stamp*

Certain property was sold for Rs 20 000 to one R who paid Rs 1 000 in cash and agreed to give the vendors credit for Rs 19 000 to be drawn against as required Shortly afterwards the parties agreed to rescind the contract and R resold the property to his vendors giving them a conveyance in which the consideration was stated to be Rs 1 000 in cash no mention being made of the extinction of his liability to pay the remaining Rs 19 000 *Held* on these facts that R had committed an offence within the purview of section 64 (a) of the Indian Stamp Act, 1899

THE facts of this case were as follows —

Certain property was sold by Mahadeo Prasad and Sita Ram to Rameshar on 14th September, 1908, for the sum of Rs 20,000 Out of this sum Rs 1,000 only were paid in cash, and the remainder, Rs 19 000, was expressed in the sale deed as having been left in deposit with the vendee by the vendors, who intended to draw upon the deposit from time to time As it happened, however, no portion of the deposit was drawn upon A few months later, on 2nd March, 1909, Rameshar executed a sale deed by which he re conveyed the same property to the original vendors The consideration for this re sale was stated in the

* Criminal Revision No 687 of 1909 from an order of Muhammad Ali, Sessions Judge of Mirzapur, dated the 14th August 1909

profits, was without jurisdiction That is not the case here As we have pointed out above, the court of first instance was competent to determine the question of restitution It had therefore jurisdiction to award mesne profits by way of restitution and it cannot be rightly contended that in so awarding it, it acted without jurisdiction We are therefore of opinion that the sale which took place in execution of the decree for mesne profits so far back as the year 1881 was a valid sale and conveyed to the purchaser the equity of redemption of the vendors of the plaintiff

The next contention on behalf of the appellant is that the order of the 31st of March 1881 was procured by the mortgagee by fraud We are not satisfied that any fraud was perpetrated It is true that the mortgagee had withdrawn from court the amount awarded to him under the decree of the court of first instance but that circumstance did not in any way affect his right to claim mesne profits, upon the decree of the court of first instance being varied and superseded by the decree of the lower appellate court There was nothing which he concealed from the court, and we fail to see in what respect it can be said that he acted fraudulently to the injury of the interests of the mortgagors

The third contention on behalf of the appellant is that the court below ought not to have dismissed the suit totally, and that the whole of the equity of redemption had not passed to the mortgagee Debi Das It is said that after the death of Zahur Ahmad Khan a portion of his interest in the mortgaged property was inherited by his five daughters, two of whom died in 1897 The brothers of those daughters, it is urged, inherited a portion of their share, and as this share was acquired after the auction sale, and as the sisters were no parties to the suit in which mesne profits were awarded, the share of the sisters inherited by the plaintiff's vendors, was saved to them and as purchaser of such share the plaintiff is entitled to claim redemption As we have already stated, Abdul Rashid, Abdul Aziz and Mahmud Khan sold 4 biswas to the plaintiff on the 7th of December, 1901 The sale-deed distinctly refers to the 4 biswas as being part of the 7 biswas mentioned in the *khewat* as *khata* No 1 The 7 *biswas* share was purchased by Abdul Rashid, Abdul Aziz and Mahmud Khan from the original mortgagor Ram Bakhsh in 1869

Rameshar, could therefore have no interest in undervaluing the consideration, he had no motive for committing a fraud on the revenue

Mr *A E Ryves* (Government Advocate), for the Crown, contended that the main question in the case was as to what was the true consideration for the second deed, *i e* whether the cancellation of the credit of Rs 19 000 was also part of the consideration or not. In the present case the whole of the Rs 20,000 had actually passed at once, only Rs 19,000 were deposited with the vendee as with a bank. The parties were bankers, and the Rs 19 000 were deposited with Rameshar just as the sum might be deposited with the Allahabad Bank He further contended that the crucial test in the case was, ' To whom did the Rs 19 000 belong after the execution of the second sale deed? ' There could be no doubt that the deposit of Rs 19 000 was no longer kept alive, and that the original vendors could not now claim to get this sum from Rameshar. It was obvious, therefore, that the real consideration for the second deed was Rs 20 000 and not Rs 1,000

Mr *A P Dube* was heard in reply

KNOX and PIGGOTT, JJ —The essential facts of this case are as follows —On the 12th of September, 1908, Mahadeo Prasad and Sita Ram executed a sale deed conveying certain property to Rameshar Das, the applicant in revision now before this Court The consideration for the sale was Rs 20 000, of which only Rs 1 000 was paid down in cash, the covenant for the remainder being that Rameshar Das should keep the sum of Rs 19 000 in deposit to the credit of the vendors, the latter to draw upon it at their convenience on tendering receipts Before anything more was paid the parties repented of their bargain Rameshar Das reconveyed the same property to Mahadeo Prasad and Sita Ram, the sale deed purporting to be simply for a consideration of Rs 1,000 paid down in cash The courts below have held that Rameshar Das thereby committed an offence punishable under section 64 (*a*) of the Indian Stamp Act (Act No II of 1899) in that he executed an instrument in which all the facts and circumstances required by section 27 of the said Act were not fully and truly set forth This section requires that the consideration, if

## APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji*

HARGAWAN MAGAN AND ANOTHER (DEFENDANTS) *v* BAIJNATH DAS (PLAINTIFF) AND SHEO DAS (DEFENDANT) *

*Act No IV of 1882 (Transfer of Property Act), Chapter II, section 6, clause (a)—Reversioner—Release by reversioner of his interest in certain promissory notes expectant on death of present holder*

The reversioner expectant on the death of a Hindu widow executed a document purporting to be a release in favour of the widow of his interest in certain Government promissory notes to which the widow was entitled during her life *Held* that this was a transfer of the chance of an heir apparent succeeding to property and therefore void. *Sham Sundar Lal* v *Achhan Kunwar* (1) referred to

THE facts of this case were as follows:—

One Ghaibi Ram died leaving three sons, Baijnath Das, Sheo Das, and Gauri Shankar, and a widow Musammat Parbati Sometimes after Ghaibi Ram's death, the three sons separated and distributed the property left by their father among themselves After separation Gauri Shankar died childless leaving a widow Musammat Rambha A guardian was appointed of the property of Musammat Rambha, as she was a minor at the time of her husband's death He converted the entire property left by Gauri Shankar to Government promissory notes Musammat Rambha also died, and the property in the promissory notes devolved upon Musammat Parbati, mother of Gauri Shankar, as his next heir Some disputes arose between Musammat Parbati and Sheo Das, which came to an end in a compromise, whereby Sheo Das released all his reversionary right in the promissory notes in favour of Musammat Parbati After Musammat Parbati's death Hargawan and Mul Chand, who held a decree against Sheo Das, proceeded to attach one half of the Promissory notes in execution of their decree, alleging it to be the share of Sheo Das, judgment debtor, as one of the reversioners of Gauri Shankar Baijnath Das objected to the attachment under section 278 of the Code of Civil Procedure, 1882 He stated that inasmuch as Sheo Das had already

* First Appeal No. 65 of 1908 from a decree of Shah Amjadullah, Subordinate Judge of Mirzapur, dated the 30th of January 1908.

(1) (1898) I. L. R., 21 All., 71.

liability in respect of this sum of Rs 19,000 upon an instrument bearing a stamp duty of Rs 5 only. The answer to this argument is to be found in the provisions of sections 5 and 6 of the Indian Stamp Act. The sale deed of the 12th of September 1908 had transferred to Rameshar Das full proprietary title in the land in question (*Vid* I L R, 11 All, 211) Because of the provisions of section 54 of the Transfer of Property Act (Act IV of 1882) this title could not be re transferred to the original vendors except by a registered instrument Such instrument, in whatever way the parties might elect to word it, would necessarily contain provisions bringing it within the definition of a "conveyance" in section 2, clause 10, of Act II of 1899 It would therefore be liable to duty as a conveyance upon the full consideration which actually passed between the parties Finally, it is necessary for a conviction in this case that we should be prepared to hold that the sale-deed of the 2nd of March, 1909, was drafted in the particular form in which it actually stands, "with intent to defraud the Government" The courts below have held that it was, and it would certainly be impossible for us to say on revision that this finding must be reversed because we were of opinion that there was no evidence on the record upon which such finding could properly be based We think, moreover, that the omission in the sale-deed of March, 1909, to make any reference whatever to the unpaid consideration, could only have been intended to avoid any question being raised as to the liability of the parties to stamp duty over and above that due on the sum of Rs. 1,000 By evading the obligation which lay upon them, the parties have defrauded the Government of stamp duty, just as much as they would have done if Rameshar Das had in the first instance paid the original vendors Rs 19,000 in cash taken the receipt for the same upon a one anna stamp, and the parties had then executed a deed of sale purporting to convey the property for a consideration of Rs 1,000 It is to meet such abuses that section 27 of the Indian Stamp Act was framed, and we think that the present case is within the purview of that section. We dismiss the application for revision

the predecessor in title of the other appellant, held a decree, dated the 17th of November, 1903, against Sheo Das and in execution of that decree they caused a half share of the promissory notes to be attached as the property of Sheo Das Thereupon Baijnath Das preferred a claim alleging that he alone was entitled to the promissory notes His objection having been overruled the suit out of which this appeal has arisen was brought by him for a declaration that the half share of the promissory notes attached by the decree holders was not liable to sale in execution of their decree

The court below has made a decree in favour of Baijnath Das for one half of the half share claimed by him It was of opinion that the document of the 1st of August, 1904, was a deed of family settlement and that under it Musammat Parbati acquired an absolute interest in one half of the promissory notes

From this decree the present appeal has been preferred The first contention on behalf of the appellants is that the claim is barred by limitation, inasmuch as the suit was originally brought against Hargawan Magan only and the representative of Mul Chand was added after the expiry of one year from the date of the order disallowing the objection preferred by Baijnath Das This contention is in our opinion untenable, inasmuch as we find that the aforesaid order was passed in proceedings to which Mul Chand or his legal representative was not a party The plaintiff no doubt was bound to bring his suit within one year from the date of the order to have it set aside as against the persons in whose favour it was made, but as Mul Chand or his legal representative was not a party to the proceedings in which the order was passed, the provision of the Limitation Act which requires a suit to be brought within one year did not apply as against him The main contention on behalf of the appellants is that the release dated the 1st of August, 1904, was in reality a transfer of reversionary rights and that such a transfer is void having regard to section 6 *(a)* of the Transfer of Property Act This contention is in our opinion well founded By the instrument mentioned above Sheo Das purported to convey to his mother his interests in the Government promissory notes Those interests were only those of a reversioner At the time when

Munshi *Gobind Prasad*, for the respondent, relied on *Rani Anund Koer* v *The Court of Wards* (1) and argued that because the presumptive heir by reason of having signed the deed of gift had rendered himself incapable of suing, the remoter reversioner could sue

1910

BAKHTAWAR v BHAGWANA.

STANLEY, C J, and BANERJI J —The main question raised in this appeal is similar to that which was decided by a Full Bench of this Court in the case of *Ramphal Rai* v *Tula Kuari* (2) It was in that case decided that a gift by a Hindu widow, who succeeded to the separate estate of her deceased husband, of such estate is not valid and does not create a title which cannot be impeached by the remoter reversioner because it has been made with the consent of the next reversioner In the case before us Musammat Kauli who was the widow of one Kallu, made a gift of property which belonged to her deceased son, Bhulan, in favour of the defendant Bakhtawar, the son of Musammat Bharno, a cousin of Kallu This gift was made with the consent of Jasram, who is the nearest reversionary heir to Bhulan The gift is impeached by the plaintiffs who are remoter reversioners

It is contended before us that the ruling in *Ramphal Rai* v *Tula Kuari* must be taken to have been overruled by the decision of their Lordships of the Privy Council in the case of *Bajrangi Singh* v *Manokarnika Bakhsh Singh* (3) In that case a Hindu widow without legal necessity and without the consent of the reversionary heirs executed deeds of sale of successive portions of her husband's estate to her son in law Afterwards deeds of relinquishment for valuable consideration ratifying the sale deeds and agreeing not to dispute their validity were executed by all the nearest *reversionary heirs, being the only living* reversioners in the line of the common ancestor of themselves and the deceased owner of the estate It was held that the consent of these persons was sufficient and binding on their descendants and that it was immaterial that it was given after the execution of the sale deeds This was a case of sales and not a case of gift and cannot be deemed therefore to govern the present case In the course of their judgment their Lordships of the Privy Council

(1) (1880) L R 8 I A 14; I L R 6 Calc, 764 (2) (1883) I L R 6 All 116

(3) (1907) I L R, 30 All, 1.

reversionary heir refuses without sufficient cause to institute proceedings, or if he has precluded himself by his own act or conduct from suing or has colluded with the widow, or has concurred in the act alleged to be wrongful, the next presumable reversionary heir would be entitled to sue." | 1910 / BAKHTAWAR v. BHAGWANA

These are the only questions discussed in the appeal and the appeal appears to us to be without force. We therefore dismiss it with costs.

*Appeal dismissed.*

---

1909 December 17.

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.*

CHHUTAN LAL (DEFENDANT) v. SHIAM PRASAD AND OTHERS (PLAINTIFFS) AND MUSAMMAT MUL KUNWAR AND OTHERS (DEFENDANTS).*

*Act No. III of 1877 (Indian Registration Act), section 33—Registration—Presentation of document by agent holding a power of attorney—Authentication of power.*

A document was presented for registration by the agent of a *parda-nashin* lady acting under a power of attorney authorizing him generally to present documents for registration on behalf of his principal. The power of attorney was not executed in the presence of the Sub-Registrar, but the Sub-Registrar had gone to the house of the executant, questioned her and satisfied himself that the power of attorney had been voluntarily executed and had endorsed the power of attorney with a statement that he had so satisfied himself. *Held* that the power of attorney was properly executed and authenticated within the meaning of section 33 of the Indian Registration Act, 1877, and the document presented by the executant's agent was validly presented.

THIS was a suit for sale on a mortgage executed under the following circumstances. The mortgagor Musammat Mul Kunwar, a *parda nashin* lady, on the 28th October, 1897, executed a general power of attorney in favour of Narain Prasad and Mazhar Ali Khan, and on the 31st October following executed the mortgage deed in suit. On the 4th November, 1897, both the documents were presented for registration on behalf of the lady at the office of a Sub-Registrar by Mazhar Ali Khan. On the next day the Sub-Registrar proceeded to the dwelling house of the lady and on her admitting the execution and the completion of the documents registered the power of attorney and the mortgage deed. On suit brought by the mortgagees for sale one of

* First Appeal No. 206 of 1908 from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 25th May, 1908.

# THE INDIAN LAW REPORTS.

*Published in FOUR SERIES, viz —*

## CALCUTTA, MADRAS, BOMBAY AND ALLAHABAD

THE Indian Law Reports published under the authority of the Governor General in Council are printed in monthly parts, which are issued, as soon as possible after the first of each month, at Calcutta Madras, Bombay and Allahabad, respectively

[illegible] High [illegible] Series [illegible] subject [illegible] Bombay [illegible]

Persons desiring to subscribe for or purchase the reports should apply to—
the Officer in charge, Bengal Secretariat Book Depôt Calcutta or
the Superintendent, Government Press Madras or
the Superintendent, Government Central Press Bombay, or
THE CURATOR OF GOVERNMENT BOOKS, United Provinces Allahabad

### PRICES

The terms of subscription, and the terms on which current issues and back numbers are sold, are as follows —

| | Without postage | With Indian postage | With Foreign postage. |
|---|---|---|---|
| | Rs a. p | Rs a. p. | Rs a p |
| COMPLETE SERIES— | | | |
| Current issues, per annum | | 22 8 0 | 28 0 0 |
| Back numbers, per annum | 20 0 0 | 22 8 0 | 29 0 0 |
| CALCUTTA SERIES— | | | |
| Current issues, or back numbers, per annum | 10 0 0 | 12 8 0 | 14 0 0 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | | |
| Current issues or back numbers per annum | 6 0 0 | 7 0 0 | 8 0 0 |
| ANY MONTHLY PART— | | | |
| Calcutta Series | 2 0 0 | 2 0 0 | 2 0 0 |
| Madras, Bombay or Allahabad Series | 1 0 0 | 1 0 0 | 1 0 0 |

*All payments must be made in advance* Remittances to Calcutta should be addressed to the TREASURER, BENGAL SECRETARIAT *Writers Buildings, Calcutta*

### PARTS OUT OF STOCK AND DUPLICATE COPIES

WHEN a requisition is received for any set of the reports and any Parts are out of stock the following deduction from the foregoing rates is made for such Parts —

| | Without postage | With Indian postage |
|---|---|---|
| | Rs a p | Rs. a p |
| CALCUTTA SERIES | | |
| All Parts for one year | 7 2 6 | 8 6 3 |
| Any one Part | 0 6 9 | 0 10 3 |
| MADRAS BOMBAY OR ALLAHABAD SERIES— | | |
| All Parts for one year | 4 4 6 | 4 11 3 |
| Any one Part | 0 5 3 | 0 5 9 |

If any Part is lost in transit to a subscriber, and the fact is reported to the office of distribution within three months from the date of publication, a duplicate will be supplied at the following rate —

| | Without postage | With Indian postage |
|---|---|---|
| | Rs a p | Rs a p |
| CALCUTTA SERIES | 0 8 9 | 0 10 3 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES | 0 5 3 | 0 5 9 |

### REPRINTS

THE Complete Series for the years 1878 1879 1880 1882 1884 1888, 1890, 1891, 1893, 1896, 1897, 1899 1900 1901 and 1904 to 1909 has been reprinted and may be purchased at the Bengal Secretariat Book Dépôt, Calcutta either wholly or in part. All parts required to complete the stock of the Reports for other years are now being reprinted Complete Reports from the beginning to date will therefore shortly be available at the Bengal Secretariat Book Dépôt

### ADVERTISEMENTS FOR THE CALCUTTA SERIES

ADVERTISEMENTS of law publications only are received Rates can be ascertained on application to the Bengal Secretariat Book Depôt

# THE BENGAL LAW REPORTS.

SEVERAL volumes of the Bengal Law Reports from August 1868 to December 1875, and Full Bench Rulings Parts I and II, are available at the Bengal Secretariat Book Dépôt, Calcutta, at the following rates:—

| | Without postage | With Indian postage |
|---|---|---|
| | Rs a p | Rs. a. p |
| BENGAL LAW REPORTS for one year | 20 0 0 | 22 8 0 |
| Single copies each | 2 0 0 | 2 0 0 |
| FULL BENCH RULINGS Parts I and II | 20 0 0 | 22 8 0 |

sale upon a mortgage executed on the 31st October, 1897, by Musammat Mul Kunwar and one Budh Sen. The appellant, who was the fifth defendant to the suit, is the purchaser of the mortgaged property. It is contended on his behalf that the mortgage deed was not validly registered and cannot therefore affect the mortgaged property. The foundation for this contention is that the document was presented for registration by one Mazhar Ali, who purported to hold a general power of attorney from Musammat Mul Kunwar. It is urged that the power of attorney was not registered and authenticated in accordance with the provisions of the Registration Act, and that therefore the presentation of the mortgage deed for registration was not a valid presentation. In our judgment this contention has no force. The mortgage deed was presented for registration by Mazhar Ali, who held a power of attorney which authorized him to produce any document executed by Musammat Mul Kunwar in the registration department and have the same registered. Section 32 of the Registration Act provides that a document shall be presented for registration by some person executing or claiming under it, or, among others, by the agent of such person duly authorized by power of attorney executed and authenticated in the manner provided in the following section. Section 33 provides that if the principal at the time of executing the power of attorney resides in any part of British India in which the Act is for the time being in force, a power of attorney executed before and authenticated by the Registrar or Sub Registrar within whose district or sub district the principal resides, would be recognized as a power of attorney authorizing the agent to present the document for registration. This section, however, has a *proviso* to the effect that persons exempt by law from personal attendance in court would not be required to attend at a registration office or court for the purpose of executing such power of attorney, and that in the case of such a person, if the Registrar or Sub Registrar be satisfied that the power of attorney has been voluntarily executed by the person purporting to be the principal, he may attest it without requiring the personal attendance of the principal. The *proviso* farther lays down that to obtain evidence as to the voluntary nature of the execution the Registrar or

The Bombay Code, Vol. I, Third Edition, 1907 ... ... ... Rs 4 (8 a.)
Ditto Vol II, Third Edition, 1907 ... ... ... Rs 6 (8 a)
Ditto Vol III, Third Edition, 1908 ... ... ... Rs 5 (8 a)
Ditto Vol IV Third Edition, 1909 ... ... Rs 4 (8 a)
Volumes I to IV Reduced to Rs 11 per set.
The Coorg Code, Third Edition, 1908 ... ... ... Rs 2 (4 a)
E B & Assam Code, Vol I, Edition 1907 ... ... ... Rs 6 (10 a)
Ditto Vol II, Edition 1907 ... ... Rs 6 (9 a)
Ditto Vol III, Edition 1907 ... ... Rs 6. (9 a)
Volumes I to III reduced to ... ... ... Rs 16 (per set.)

The United Provinces Code, Volume I, Fourth Edition, 1906, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table, Rs 5 (8 a)

The United Provinces Code, Vol II, Fourth Edition, 1906, consisting of the Acts of the Lieutenant Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in, or extended to, the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874 with an Index Rs 10 (Re 1) for both Vols or Rs 5, (8 a) for each Volume

The United Provinces Code Vols I and II reduced to Rs 7 per set

*In the Press*

A Digest of Indian Law Cases 1908, by C E Grey, Barrister-at Law
A new edition of the Burma Code

## II – REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION

Act I of 1846 (Legal Practitioners), as modified up to 1st October, 1907 2 a (1 a)
Act XXXVII of 1850 (Public Servants Inquiries) as modified up to 1st August 1908 11 a (1 a)
Act XXX of 1852 (Naturalization of Aliens), as modified up to 30th April, 1908 ... 2 a (1 a)
Act XX of 1853 (Legal Practitioners) as modified up to 1st September, 1907 ... ... 1 a 9 p (1 a)
Act XXIII of 1855 (Administration of mortgaged Estates) as modified up to 1st October 1908 1 a 3 p (1 a)
Act XXIV of 1855 (Penal Servitude) as modified up to 1st January, 1909, 2 a (1 a)
Act XIII of 18[illegible] (Opium) as modified up to 1st August, 1908 4 a 3 p (1 a)
Act IX of 18[illegible] (Forfeiture) as modified up to 1st October 1908 1 a 9 p (1 a)
Act XXIV of 1859 (Madras District Police), as modified up to 1st November, 1907 ... 3 a [illegible] p 2 a)
Act XVI of 1863 (Excise Duty on Spirits), as modified up to 1st October, 1908 ... ... 2 a (1 a)
Act XXXI of 1863 (Gazette of India) with footnotes 1 a 3 p (1 a)
Act X of 1865 (Succession), as modified up to 1st April 1909 Rs 1 8 (2 a)
Act XXII of 1867 (Sarais and [illegible]) as modified up to 1st August 1908 ... ... 2 a (1 a)
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st O[illegible] 1[illegible]7 ... [illegible] a)
Act [illegible] of 18[illegible] ([illegible] of War) as modified up to 1st Janu[illegible] 1[illegible] ... ...
Act [illegible] ([illegible]) as modified up to 1st October 1[illegible] [illegible] a)
Act XII of 1870 ([illegible]) as modified up to 1st February 190[illegible]
Act XXVII of 1871 (Criminal Tribes) as modified up to 1st [illegible] 190[illegible] ... ... ... ...

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

1909
December 10.

DURGA PRASAD (PLAINTIFF) *v.* DAMODAR DAS (DEFENDANT).*

*Hindu law—Mitakshara—Joint Hindu family—Agreement entered into with one member of family—Such member competent to sue without joining other members.*

Where a contract is entered into on behalf of a joint family business by a member of the family in his own name, it is not necessary that any members of the joint family other than those who entered into the contract should be parties to the suit brought thereon. *Gopal Das* v. *Badri Nath* (1) followed. *Agacio* v. *Forbes* (2), *Bungsee Singh* v. *Soodist Lall* (3) and *Hari Vasudev Kamat* v. *Mahadu Dad Gavda* (4) referred to. *Shamrathi Singh* v. *Kishan Prasad* (5) distinguished.

THE plaintiff in this case came into court alleging that he had entered into a contract with the defendant for the purchase of certain bars of silver; that he had advanced to the defendant part of the price of the silver, but that the defendant had not delivered the silver. The plaintiff accordingly claimed damages for breach of contract. The defendant pleaded, *inter alia*, that the plaintiff, who carried on business along with other members of his family as dealers in gold and silver lace, was not competent to sue without joining as co-plaintiffs the other members of the family. The court of first instance (Subordinate Judge of Bareilly) gave the plaintiff a decree. On appeal, however, this decree was set aside by the District Judge upon the ground of non-joinder of necessary parties, and the suit dismissed. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* (with him The Hon'ble Pandit *Sundar Lal*, and Pandit *Baldeo Ram Dave*), for the appellant:

It is not in every case where a Hindu joint family is interested in the result of a suit that they should be made parties thereto. In the present case the contracts were entered into with the plaintiff, after whom the firm was called, and the written agreements were executed in his favour alone. Upon the authorities, the plaintiff was clearly entitled to sue without impleading

* Second Appeal No 856 of 1908, from a decree of W. H. Webb, District Judge of Bareilly, dated the 6th of August, 1908, reversing a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 13th of February, 1907.

(1) (1904) I. L. R., 27 All., 361.
(2) (1861) 14 Moo. P. C., 160.
(3) (1881) I. L. R., 7 Calc., 739.
(4) (1895) I. L. R., 20 Bom., 435.
(5) (1907) I. L. R., 29 All., 311.

| | | |
|---|---|---|
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 | | In Nagri 9 p (1 a) |
| Act I of 1906 [Indian Tariff (Amendment)] | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act III of 1906 (Coinage) | | In Urdu 9 p (1 a) |
| Ditto | ditto | In Nagri 9 p (1 a) |
| Act V of 1906 (Stamp Amendment) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act III of 1907 (Provincial Insolvency) | | In Urdu 1 a 6 p (1 a) |
| Ditto | ditto | In Nagri 1 a 6 p (1 a) |
| Act IV of 1907 [Repealing and Amending (Rates and Cesses)] | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act V of 1907 (Local Authorities Loan) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act VI of 1907 (Prevention of Seditious Meetings) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act I of 1908 (Legal Practitioners) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act II of 1908 (Tariff) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act V of 1908 (Code of Civil Procedure) | | In Urdu Re 1 2 a (6 a) |
| Ditto | ditto | In Nagri Re 1 2 a (6 a) |
| Act VI of 1908 (Explosive Substances) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act VII of 1908 (Incitements to offences) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act IX of 1908 (Limitation) | | In Urdu 2 a (1 a) |
| Ditto | ditto | In Nagri 2 a (1 a) |
| Act X of 1908 (Salt Duties) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p. (1 a) |
| Act XI of 1908 (Assam Labour and Emigration) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p. (2 a.) |

## V.—MISCELLANEOUS PUBLICATIONS

| | | | |
|---|---|---|---|
| Table showing Effect of Legislation in the Governor General's Council during 1906 | | | 3 a 6 p (1 a) |
| Ditto | ditto | during 1907 | 2 a 6 p (1 a) |
| Ditto | ditto | during 1908 | 4 a (1 a) |

Annual Indexes to the Acts of the Governor General of India in Council for 1906 and 1907 The price is noted on them

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date Super royal 4to Annual subscription Rs 5. (Re 1); single issue 4a including postage

| | | | |
|---|---|---|---|
| Addenda and Corrigenda List No I of 1906 to the List of General Rules and Orders | | | 3 p (1 a) |
| Ditto | ditto | No II of 1906 | 1 a 9 p. (1 a) |
| Ditto | ditto | No I of 1907 | 3 p (1 a) |
| Ditto | ditto | No II of 1907 | 1 a (1 a) |
| Ditto | ditto | No I of 1908 | 1 a 6 p (1 a) |
| Ditto | ditto | No II of 1908 | 2 a 9 p (1 a) |

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India 1901-03 with an Index of cases compiled under the orders of the Government of India by F O Wigley of the Inner Temple Barrister-at-Law Edition 1905 [illegible] to be Super royal

in the nature of a wagering contract and was therefore not enforceable, and also that the plaintiff had no right to sue alone

The court of first instance gave a decree in favour of the plaintiff, but upon appeal the lower appellate court dismissed the plaintiff's claim on the ground of the non joinder in the suit of the other members of the plaintiff's firm In dismissing the suit the learned District Judge held that the decision in *Gopal Das* v *Badri Nath* (1) relying on which the court of first instance had decreed the plaintiff's claim was not applicable, but that the case was governed by the ruling in the case of *Shamrathi Singh* v *Kishan Prasad* (2)

From this decision the present appeal has been preferred, and it is contended before us that the case is governed by the decision in *Gopal Das* v *Badri Nath* It is to be observed that the contract with the defendant was entered into by Durga Prasad alone and that *sattas* were executed by the defendant in his favour It does not appear that at the time of the contract any mention was made of other members of the firm We think in view of this that the learned District Judge was wrong in reversing the decision of the court of first instance It has been held in a number of cases, including a case before the Privy Council, *Agacio* v *Forbes* (3), that one partner, with whom personally a contract is made, is entitled to sue upon the contract in his own name, without joining his co partners as plaintiffs The rule of law governing a case of the kind is stated in the judgment in *Bungsee Singh* v. *Soodist Lall* (4) In that case a mortgage bond was executed in the name of the plaintiff alone, he being one member of a joint Hindu family, and it was held that he was entitled to sue as the person who entered into the contract, not only on behalf of himself but on behalf of the other members of the family Again, in the case of *Hari Vasudev Kamat* v *Mahadu Dad Gavda* (5), in which a loan was made to the defendant out of joint family funds and a bond for the amount of the loan was given in the name of one of the members of the joint family, it was held that that member in whose favour the bond was given was competent to sue, and that the other members of the joint

(1) (1904) I L R 27 All 361
(2) (1907) I L R 29 All 311
(3) (1861) 14 Moo P C 160
(4) (1881) I L R 7 Calc 739
(5) (1895) I L R, 20 Bom., 435

Registered No 422.

VOL. XXXII ] [PART V.



# THE INDIAN LAW REPORTS.

## MAY 1910.

(Pages 187—227 )

## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council ... J. V. WOODMAN, *Middle Temple.*
High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*



ALLAHABAD

PRINTED BY F. LUKER, SUPERINTENDENT, GOVERNMENT PRESS, AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT, UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

Price, Re. 1.

# BOOKS AND PUBLICATIONS FOR SALE

BY THE

# SUPERINTENDENT OF GOVERNMENT PRINTING, INDIA,

## 8, HASTINGS STREET, CALCUTTA

*All books published by the Superintendent of Government Printing, India, can be purchased ...ker directly or through the following or any other booksellers —*

AGENTS

CALCUTTA—*Thacker Spink & Co*
MADRAS—*Higginbotham & Co*
BOMBAY—*Thacker & Co., Ld.*; *Radhabai Atmaram Sagoon.*

NOTICE.—*Books required for private use only can be purchased. Application should be accompanied by a remittance unless it is wished that the books should be sent by value payable post, in which case, besides the ordinary postage, an additional charge will be made for registration and commission*

*Books required for the Public Service should be obtained through Local Governments.*

---

☞ *The amounts within parentheses are for packing and postage.*

---

# List of Books and Publications for sale which are less than two years old.

---

## LEGISLATIVE DEPARTMENT.

---

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No 8, Hastings Street, Calcutta.]

THE PRICES OF THE GENERAL ACTS, LOCAL CODES, MERCHANT SHIPPING, DIGEST INDEX TO ENACTMENTS AND THE DIGESTS OF INDIAN LAW CASES, 1901 TO 1907 (SEPARATELY AND PER SET OF FIVE VOLUMES) HAVE BEEN CONSIDERABLY REDUCED.

...SE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPARTMENT.

---

### I.—THE INDIAN STATUTE BOOK.

REVISED EDITION.

*Super royal 8vo, cloth lettered*

#### B.—GENERAL ACTS.

General Acts of the Governor General of India in Council, Vol I, from 1834 to 1867, Edition 1900 ... .. Rs 6 (10a)

...neral Acts of the Governor General in Council, Vol. II, from 1868 to 1878 Edition 1909 ... ... Rs 7 (10a)

...neral Acts of the Governor General in Council, Vol. III, from 1879 to 1886, Edition 1900 ... ... Rs 6 (9a)

...eral Acts of the Governor General in Council, Vol IV, from 1887 to 1897, Edition 1909 ... .. Rs 6 (9a)

...eral Acts of the Governor General in Council, Vol V, from 1898 to 1908, Edition 1909 ... ... Rs 6, (9a.)

...me VI is in the Press.

#### C.—LOCAL CODES.

...engal Code, Third Edition, 1905, containing the Regulations and Local Acts in force in Bengal Vols I to V. Rs. 6 a volume or Rs 30 Reduced to Rs. 20 for set of 5 Vols

| | |
|---|---|
| Act I of 18"2 (Evidence) as mod fied up to 1st May 1908 | Re 1 (2 a) |
| Act IX of 1872 (Contract) as mod fied up to 1st February 1908 | Re 1 4 a (2 a) |
| Act I of 18"8 (Opium) as modified up to 1st October 1907 | 5 a 6 p (1 a) |
| Act VI of 18"8 (Treasure Trove) as modified by Act XII of 1891 as reprinted on the 14th February, 1908 | 2 a 9 p (1 a) |
| Act VIII of 1878 (Sea Customs), as modified up to 1st June 1908 | Rs 1 5 3 (4 a) |
| Act XI of 18"8 (Arms) as modified up to 1st October 1908 | 6 a (1 a) |
| Act XVI of 1879 (Transport of Salt) as modified up to 1st October 1907 | 1 a 6 p (1 a) |
| Act XVIII of 1881 (Central Provinces Land revenue) as modified up to 1st March 1909 | Rs 1 2 (3 a) |
| Act IV of 1884 (Explosives) as modified up to 1st September 1908 | 4 a 9 p (1 a) |
| Act III of 1888 (Police) as modified up to 1st January 1909 | 1 a 9 p (1 a) |
| Act II of 18 9 (M a r s of Leng h w th footnotes) | 1 a 3 p (1 a) |
| Act IV of 188 (Indian Merchandise Marks) as modified up to 1st August 1908 | 6 a (1 a) |
| Act V of 1889 (Probate and Administration) as modified up to 1st January 1909 | 2 a 9 p (1 a) |
| Act VI of 1890 (Charitable Endowments) as modified up to 1st August, 1908 | 2 a 6 p (1 a) |
| Act XI of 1890 (Prevention of Cruelty to Animals) with foot notes | 2 a (1 a) |
| Act XIII of 1890 (Excise Mal Liquors) as modified up to 1st October, 1908 | 1 a 6 p (1 a) |
| Act VIII of 1899 (Petroleum) as modified up to 1st January 1909 | 7 a (1 a) |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 | 2 a 6 p (1 a) |
| Act X of 1904 (Co operative Credit Societies) with reference to rules under the Act | 5 a 6 p (1 a) |

## III —ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED

Acts (Unrepealed) of the Governor General of India in Council from 1907 up to date

[Regulations made under the Statute 33 Vict Cap 3 from 1907 up to date

The above may be obtained separately The price is noted on each]

## IV —TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL

| | | |
|---|---|---|
| Act XIII of 1857 (Opium) as modified up to 1st August 1908 | | In Urdu 9 p (1 a) |
| Ditto | ditto | In Nagri 9 p (1 a) |
| Act XXII of 1867 (Sarais and Paraos) as modified up to 1st August 1908 | | In Urdu 6 p (1 a) |
| Ditto | ditto | In Nagri 6 p (1 a) |
| Act XXV of 1867 (Press and Registration of Books) as modified up to 1st October 1907 | | In Urdu 1 a 3 p |
| Ditto | ditto | In Nagri 1 a 3 p |
| Act V of 1870 (Unclaimed Deposits) as modified up to 1st October 1908 | | In Nagri 3 p (1 a) |
| Act I of 1872 (Evidence) as modified up to 1st May 1908 | | In Urdu 8 a (2 a) |
| Ditto | ditto | In Nagri 8 a (2 a) |
| Act I of 1878 (Opium) as modified up to 1st October, 1907 | | In Urdu 1 a 6 p ( |
| Ditto | ditto | In Nagri 1 a 6 p ( |
| Act XIII of 1889 (Cantonments) as modified up to 1st October 1907 | | In Urdu 3 a (1a 6 |
| Act XII of 1896 (Excise) as modified up to 1st March 1907 | | In Urdu 2 a 9 p ( |
| Ditto | ditto | In Nagri 3 a 3 |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February, | | |

A Digest of Indian Law Cases, containing the High Court Reports and Privy Council Reports of Appeals from India 1904, with an Index of cases, compiled under the orders of the Government of India, by C. E Grey, Bar at-Law, Edition 1907 Rs 5 Reduced to Rs 1 4 0 per copy ... . (6 a)

Ditto ditto 1905 by C E Grey, Bar at-Law, Edition 1907 ... Rs 5 Reduced to Rs 1-4-0 per copy (6 a)

Ditto ditto 1906 by C P Grey, Bar-at Law, Edition 1908 ... . Reduced to Rs 1 4-0 per copy (6 a)

Ditto ditto 1907 by B D Bose, Bar at-Law, Edition 1908 .. Reduced to Rs 1-4 0 per copy (5 a)

(Set of Digests from 1901—1907 Reduced to Rs 10 per set of 5 volumes)

General Rules and Orders made under enactments in force in British India consisting of General Rules Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index In three Volumes Rs 15 Reduced to Rs 10 per set (Rs 2) or Rs 5 per Vol (12 a)

Title page and Contents of the Acts passed by the Governor General of India in Council in the year 1907 .. .. 1 a 6 p (1 a)

| | | |
|---|---|---|
| Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December, 1903 ... | 1a. 6p. | (1 a) |
| Act XX of 1856 (Bengal Chaukidars), as modified up to 1st November, 1903 .. | 7a | (1 a) |
| Act IV of 1857 (Tobacco, Bombay Town), as modified up to 1st December, 1906 | 3 a 9 p | (1 a) |
| Act XXIX of 1857 (Land Customs, Bombay), as modified up to 1st December, 1895 .. | 4 a | (1 a) |
| Act III of 1858 (State Prisoners), as modified up to 1st August, 1897 .. | 2 a | (1 a) |
| Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 .. | 4 a 3 p | (1 a) |
| Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903 ... | 2 a 3 p | (1 a) |
| Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May 1902 | 5 a | (1 a) |
| Act I of 1859 (Merchant Shipping), as modified up to 30th June, 1905 | 13 a | (2 a) |
| Act XI of 1859 (Bengal Land Revenue Sales), as modified up to 1st August, 1906 .. | 4 a | (1 a) |
| Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874 . | 1 a 6 p | (1 a) |
| Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December, 1904 .. | 1 a. 6 p | (1 a) |
| Act XXI of 1860 (Societies Registration), as modified up to 1st December 1904 .. | 2 a. 9 p. | (1 a) |
| Act XLV of 1860 (Indian Penal Code), as modified up to 1st April, 1903, with an Index .. | Re 2-8 | (5 a) |
| Act V of 1861 (Police), as modified up to 7th March, 1903 .. | 7 a 6 p | (1 a 6 p) |
| Act XVI of 1861 (Stage carriages), as modified up to 1st February, 1898 .. | 3 a. 6 p | (1 a) |
| Act XXIII of 1863 (Claims to Waste lands), as modified up to 1st December 1896 ... .. | 4 a 9 p | (1 a) |
| Act III of 1864 (Foreigners), as modified up to 1st September, 1906 ... | 3 a. 6 p. | (1 a.) |
| Act XVII of 1864 (Official Trustees), as modified up to 1st July, 1890 ... | 5 a 6 p | (1 a) |
| Act III of 1865 (Carriers), as modified up to 31st May 1903 ... | 3 a. | (1 a) |
| Act III of 1867 (Gambling), as modified up to 1st January, 1905 .. | 4 a | (1 a) |
| Act XX of 1869 (Volunteers), as modified up to 1st May, 1896 ... | 4 a. 9p | (1 a) |
| Act I of 1871 (Cattle Trespass), as modified up to 1st May, 1906 . | 6 a | (1 a) |
| Act III of 1872 (Special Marriages), as modified up to 1st November, 1906 ... | 4 a 6p. | (1 a) |
| Act IV of 1872 (Punjab Laws) as modified up to 1st November, 1904 ... | 7a. | (1 a) |
| Act XV of 1872 (Christian Marriage), as modified up to 1st December, 1904 ... | 10 a | (2 a) |
| Act V of 1873 (Government Savings Bank) as modified up to 1st April, 1903 | 3 a. 6p | (1 a) |
| Act X of 1873 (Oaths), as modified up to 1st February, 1903 .. | 3 a. 9p | (1 a) |
| Act II of 1874 (Administrator General), as modified up to 1st July, 1890; with a list of Native States included within the Presidencies of Bengal Madras and Bombay, respectively for the purposes of the Act ... | 11 a | (2 a.) |
| Act IX of 1874 (European Vagrancy), as modified up to 1st December, 1901 ... | 6 a 6p | (1 a) |
| Act XIV of 1874 (Scheduled Districts), as modified up to 1st October, 1895 . | 6 a | (1 a) |
| Act XV of 1874 (Laws Local Extent) as modified up to 1st October, 1895 .. | 7 a | (1 a) |
| Act IX of 1875 (Indian Majority), as modified up to 1st May, 1906 .. | 2 a | (1 a) |
| Act XI of 1876 (Presidency Banks), as modified up to 1st March, 1907 ... | 11 a. | (2 a) |
| Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ... | 11 a | (1a 6 p) |
| Act VII of 1878 (Forests), as modified up to 1st December, 1903 .. ... | 10 a | (2 a) |
| Act XVII of 1878 (Ferries), as modified up to 1st June, 1902 ... .. | 6 a. | (1 a 6 p) |
| Act XVII of 1879 (Dekkhan Agriculturists' Relief), as modified up to 1st June, 1905 .. | 10 a | (2 a) |
| Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896 . | 7 a 6 p | (1 a) |
| Act VII of 1880 (Merchant Shipping), as modified up to 15th October, 1891 .. | 10 a | (2 a) |
| Act V of 1881 (Probate and Administration), as modified up to 1st July, 1900 | 12 a | (2 a) |
| Act XV of 1881 (Factories), as modified up to 1st December, 1904 ... | 5 a 6 p | (1 a) |

Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ... ... ... ... ... 6 a. 6 p. (1 a.)

Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 ... ... ... ... ... .. 1 a. 9 p (1 a.)

Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... ... ... ... ... 5 a. 6 p. (1 a)

Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June, 1894 ... ... ... ... ... ... 13 a (2 a)

Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February, 1897 ... ... ... ... ... 5 a 6 p. (1 a)

Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899 ... ... ... ... . 4 a. 9 p (1 a)

Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902... ... ... ... ... ... ... 6 a. (1 a)

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1906.
Regulations made under the Statute 33, Vict., Cap 3, from No. II of 1875 to 1906 8vo. Stitched.

[The above may be obtained separately The price is noted on each ]

## IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Acts X of 1841 and XI of 1850 (Registration of ships), as modified up to 1st December, 1893, with footnotes brought down to 1st December, 1901 In Urdu. 2 a. 6 p (1 a.)

Act XX of 1847 (Copyright), as modified up to 1st May, 1896 ... In Urdu. 1 a. 3 p. (1 a.)
Ditto ditto ... In Nagri. 1 a 3 p. (1 a.)

Act XVIII of 1850 (Judicial Officers' Protection), with footnotes ... In Urdu. 6 p (1 a)
Ditto ditto ... In Nagri. 6 p. (1 a.)

Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903 In Urdu. 6 p. (1 a.)
Ditto ditto In Nagri. 6 p. (1 a)

Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902 In Urdu. 6 p. (1 a)
Ditto ditto .. In Nagri. 6 p (1 a.)

Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904 ... ... ... ... ... In Urdu. 3 p. (1 a)
Ditto ditto .. In Nagri. 3 p. (1 a.)

Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903 In Urdu 6 p (1 a.)
Ditto ditto .. In Nagri. 6 p (1 a)

Act XV of 1856 (Hindu Widows' Re-marriage) .. ... .. In Urdu. 6 p. (1 a)
Ditto ditto ... In Nagri. 6 p. (1 a.)

Act XX of 1856, (Police Chaukidars) as modified up to 1st November, 1903 In Urdu. 2 a. 6 p. (1 a)
Ditto ditto ... In Nagri 2 a. 6 p (1 a.)

Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 ... ... ... ... ... In Urdu. 1 a. (1 a.)
Ditto ditto ... In Nagri. 1 a. (1 a.)

Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April 1903 ... ... ... ... In Urdu. 1 a. (1 a)
Ditto ditto ... In Nagri. 1 a. (1 a)

Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902 In Urdu. 1 a. 6 p. (1 a.)

Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874 ... ... ... ... ... ... In Urdu. 3 p. (1 a.)
Ditto ditto ... In Nagri. 3 p. (1 a)

Act IX of 1860 [Employers and Workmen (Disputes) as modified up to 1st December, 1904 ... ... ... ... ... In Urdu. 3 p (1 a)
Ditto ditto ... In Nagri. 3 p (1 a.)

Act XLV of 1860 (Penal Code), as modified up to 1st April 1903 ... In Urdu. Rs 1-5.
Ditto ditto ... In Nagri. Rs. 1

# PRIVY COUNCIL.

NAWAB ALI KHAN (PLAINTIFF) *v* WAHID ALI (DEFENDANT)

[On appeal from the Court of the Judicial Commissioner of Oudh ]

*Taluqdar Rights of—Payments by relatives of taluqdar holding sub proprietary rights on his estate—Rules framed by British Indian Association of Oudh for maintenance of such relatives—Basis of calculation of such payments in second and third generations—Jurisdiction of Rent Court*

The question between the parties to this appeal was as to the true construction of certain rules framed in 1867 by the British Indian Association of Oudh, and agreed to by the taluqdars making provision (*inter alia*) for maintenance for the relatives of the latter holding sub proprietary rights on their estates The portion of the rules applicable was as follows —This class will remain in possession of what they actually had at annexation "rent free" during their life-time, but subject to the payment in the second generation of 25 per cent to the taluqdar, and in the third 50 per cent, and will not have transferable rights If such persons pay the Government revenue plus 10 per cent to the taluqdar they will have heritable rights in addition"

*Held* (affirming the decision of the Court of the Judicial Commissioner) that the bulk sum on which the percentages were to be calculated was the "assumed rental" which formed the basis for the ascertainment of the Government revenue payable by the taluqdar (the Government revenue being half the "assumed rental") This construction had the advantage of giving a fixed basis for calculation, which was greatly in the interests of the taluqdars with reference to the charges on the property, and enabled all parties concerned to understand, year after year, and to forecast, their exact financial position Payments of 25 and 50 per cent respectively on the "gross rental" demandable in each particular year, together with 10 per cent. in the sense of the rule (as contended for by the appellant, the taluqdar), besides being made on a varying basis, might exceed not only the Government revenue but the entire receipt of rental actually obtained for particular years, reducing greatly the rights of the relatives in possession as sub-proprietors and rendering precarious their provision for maintenance A construction which would bring about such results was not warranted on a sound reading of the terms of the maintenance provisions

The additional sum of 10 per cent payable to the taluqdár (at any rate by the third generation) for the provision for maintenance of a heritable character might under the circumstances that the payments to the taluqdar might not be regular, and that in any view the taluqdar's responsibility to the Government for the revenue was full and direct whether he received such payments or not, be considered as a reasonable commission or insurance and had accordingly been sanctioned in the rules under construction as well as by the rules regarding sub-settlement and other subordinate rights of property in Oudh scheduled in Act XXVI of 1866

---

*Present* —Lord MACNAGHTEN, Lord ATKINSON Lord COLLINS Lord SHAW, and Sir ARTHUR WILSON

| | |
|---|---|
| Act XV of 1891 (Factories) as mod fied up to 1st Apr l 1891 | In Urdu 1 *a* 6 *p* (1 *a*) |
| D tto d tto | In Nagri 1 *a* 6 *p* (1 *a*) |
| Act XVIII of 1881 (C ntral Prov nces Land Revenue) as modified up to 1st November 1898 | In Urdu 9 *a* (1 *a* 6 *p*) |
| D tto ditto | In Nagri 9 *a* (1 *a* 6 *p*) |
| Act IV of 1882 (Transfe of P operty) as modified up to 1st March 1900 | In Urdu 6 *a* 9 *p* (? *a*) |
| Ditto ditto | In Nagri 6 *a* 9 *p* (? *a*) |
| Act VI of 1882 (Compan es) as modified up to 1st August 1906 | In Urdu 18 *a* 9 *p* (3 *a*) |
| Ditto ditto | In Nagri 14 *a* (3 *a*) |
| Act XIX of 1883 (Land Improv ment Loans) as modified up to 1st September 1906 .. | In Urdu 1 *a* (1 *a*) |
| D tto ditto | In Nagri 1 *a* (1 *a*) |
| Act IV of 1884 (Explos ves) as mod fied up to 1st May 1896 | In Urdu 1 *a* 3 *p* (1 *a*) |
| D tto d tto | In Nagri 1 *a* 8 *p* (1 *a*) |
| Act VI of 1884 (Inland Steam Vessels) as mod fied up to 1st July 1891 | In Urdu 3 *a* 6 *p* (1 *a* 6 *p*) |
| Ditto d tto | In Nagri 3 *a* 6 *p* (1 *a* 6 *p*) |
| Act XII of 1884 (Agricultur sts Loans) as mod fie l up to 1st September 1906 .. | In Urdu 6 *p* (1 *a*) |
| D tto d to | In Nagri 6 *p* (1 *a*) |
| Act XVIII of 1884 (Punjab Courts) as mod fie l u to 1st Decemb r 1899 | In Urdu 2 *a* 6 *p* (1 *a*) |
| Act II of 1885 (Negot able Ins ruments Amendm nt) | In Urdu 9 *p* (1 *a*) |
| Act III of 1885 (Transfer of Property Amend nt) | In Urdu 3 *p* (1 *a*) |
| Act X of 1885 (Oudh Estates An endm nt) | In Urdu 3 *p* (1 *a*) |
| Act XIII of 1885 (Telegraphs) as mo l ed u to 1st M c l 190 | In Urdu 1 *a* 9 *p* (1 *a*) |
| Act XXI of 1885 (Madras C v l Courts Amen m en ) .. | In Urdu 3 *p* (1 *a*) |
| Act II of 1886 (Income tax) as mod fied up to 1st Apr l 1903 | In Urdu 3 *a* (1 *a* 9 *p*) |
| D tto d tto | In Nagri 3 *a* (1 *a* 9 *p*) |
| Act IV of 18?? (Amend ng Sect on ? of Contract Act) | In Urdu 3 *p* (1 *a*) |
| Act VI of 1886 (B ths De t s and Mar g l eg strat on) | In Urdu 1 *a* 3 *p* (1 *a*) |
| Act X of 1886 (Cr m nal Law Amen lment) | In Urdu 9 *p* (1 *a*) |
| Act XI of 1886 (Tra un ys) as mod t d to 31st D cember 1900 | In Urdu 3 *a* 3 *p* (1 *a*) |
| D tto d tto | In Nagr 3 *a* 3 *p* (1 *a*) |
| Act XIII of 1886 (S cu t es as amen l d by the Repeal ng and Amending Act 1891 | In Urdu 9 *p* (1 *a*) |
| D tto d tto | In Nag i 9 *p* (1 *a*) |
| Act VI of 1887 (Companies A nen In ent) | In Urdu 3 *p* (1 *a*) |
| Act VII of 1887 (Su s Valua on) | In Urdu 9 *p* (1 *a*) |
| Act IX of 188 (l o nc al Sn all Ca se Courts as mo l fied up to 1st December 13 6 | In Urdu 2 *a* 3 *p* (1 *a*) |
| Ditto d tto | In Nagri 2 *a* 6 *p* (1 *a*) |
| Act X of 1887 (Nat ve Pa enger Sh ps) | In Urdu 1 *a* 6 *p* (1 *a*) |
| Act XII of 188 (Beng l North Wes Prov nc s and Ass m C v l Courts) | In Urdu 1 *a* 3 *p* (1 *a*) |
| D tto d tto .. | In Nagr 1 *a* 3 *p* (1 *a*) |
| Act XIV of 1887 (Inl an M ne) as mod fied up to 15 h February 1899 | In Urdu 3 *a* 6 *p* (1 *a*) |
| D tto d to | In Nagri 3 *a* 9 *p* (1 *a*) |
| Act XV of 188 (Burma M l tary Pol ce) — | In Urdu 9 *p* (1 *a*) |
| D tto | In Nagr 9 *p* (1 *a*) |
| Act XVIII of 1887 (Allahabad Un ve s ty) | In Urdu 1 *a* (1 *a*) |
| Act III of 1888 (P l ce) as mod fied up to 1st March 1893 | In Urdu 3 *p* (1 *a*) |
| D t o ( s p ) | In Nagri 6 *p* (1 *a*) |
| Act IV of 1888 (In n Re erve Forces) s mod fied up to 1s Mar h 1893 .. | In U du 3 *p* (1 *a*) |
| D tto (as p ssed) .. .. | In Nagri 3 *p* (1 *a* |
| Act V of 1888 (Inventions and Des gn .. .. | In Urdu ? *a* ? *p* |

His tenure of the village was on terms provided for by the rules of the association, and the particular rule applicable to him and of which the construction was in dispute in this appeal was as follows :—

"*First* —Persons whose land was always included in the taluqa and who never got separate kabuliats —This class will remain in possession of what they actually had at annexation 'rent fee' during their life-time, but subject to payment in the second generation of 25 per cent to the taluqdar and in the third 50 per cent, and will not have transferable rights If such persons pay the Government revenue plus 10 per cent to the taluqdar, they will have heritable rights in addition "

Mehdi Ali Khan died on 21st November 1881, and was succeeded by his daughter Abadi Begam, and in September 1888 the estate was taken over by the Court of Wards on behalf of the present appellant, the son of the taluqdar Fazl Ali Khan, who died in that year. On 5th October 1893 the Court of Wards, representing the appellant, sued Abadi Begam for arrears of rent of the village of Daryapur for the 1298, 1299, and 1300 Fasli (1891, 1892 and 1893) and obtained a decree against her She denied her liability to pay, and in November 1894 instituted a suit against the Court of Wards in the Court of the Subordinate Judge of Kheri to obtain a judicial declaration of her rights in the village. that suit was finally disposed of by a judgment of the Court of the Judicial Commissioner of Oudh, dated 9th May 1898, and the decree made in accordance with that decision declared that "Abadi Begam, the plaintiff, succeeds to the rights of Mehdi Ali Khan in village Daryapur subject to the payment of one half of the Government revenue plus 10 per cent taluqdari dues."

In 1899 the Court of Wards, acting on the above judgment of 9th May 1898, sued Abadi Begam for Rs 1,575 7-2 for arrears of rent of the village for the years 1303, 1304, 1305 and 1306 (1896, 1897, 1898 and 1899) at the rate of one-half the Government revenue plus 10 per cent on the whole Government revenue together with certain rates and cesses, and a final decree of the Court of the Judicial Commissioner, dated the 25th June 1900, upheld the decree of the Lower Court, and decided that Abadi Begam was liable to pay 10 per cent. on the whole Government revenue and the rates and cesses claimed

| | | |
|---|---|---|
| Act XIV of 1895 (Pilgrim Ships) ... ... ... ... | In Urdu | 1 a 3 p (1 a) |
| Act II of 1896 (Cotton-duties) ... ... ... ... | In Urdu. | 1 a 3 p (1 a) |
| Ditto . ... ... ... | In Nagri | 1 a (1 a) |
| Act VI of 1896 (Indian Penal Code Amendment) ... ... ... | In Urdu | 3 p 1 a) |
| Act VIII of 1896 (Inland Bonded Warehouses) .. ... ... | In Urdu | 3 p (1 a) |
| Ditto ... ... ... | In Nagri | 3 p (1 a) |
| Act XII of 1896 (Excise), as modified up to 1st August, 1905... ... | In Nagri | 3 a 3 p (1 a) |
| Act I of 1897 (Act XXXVII of 1850 Amendment) . ... ... | In Urdu | 3 p (1 a) |
| Ditto ditto ... ... . | In Nagri | 3 p (1 a) |
| Act II of 1897 (Criminal Tribes Amendment Act)... ... ... | In Urdu | 3 p (1 a) |
| Act III of 1897 (Epidemic Diseases) ... ... ... ... | In Urdu | 3 p (1 a) |
| Ditto ... ... ... .. | In Nagri | 3 p (1 a) |
| Act IV of 1897 (Fisheries) .. ... ... .. | In Urdu | 3 p (1 a) |
| Ditto . .. .. | In Nagri | 3 p (1 a) |
| Act VI of 1897 (Negotiable Instruments Act Amendment) ... | In Urdu | 3 p (1 a) |
| Ditto ditto ... ... | In Nagri | 3 p (1 a) |
| Act VIII of 1897 (Reformatory Schools) .. ... . | In Urdu | 1 a 3 p (1 a) |
| Ditto .. | In Nagri | 6 p (1 a) |
| Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 | In Urdu | 9 p (1 a) |
| Ditto ditto .. | In Nagri | 9 p (1 a) |
| Act X of 1897 (General Clauses) ... ... ... ... | In Urdu | 1 a (1 a) |
| Ditto .. .. ... | In Nagri | 1 a (1 a) |
| Act XII of 1897 (Local Authorities Emergency Loans) ... . | In Urdu | 3 p (1 a) |
| Ditto ditto ... . | In Nagri | 3 p (1 a) |
| Act XV of 1897 (Cantonments) . . ... | In Urdu | 3 p 1 a) |
| Act I of 1898 [Stage carriages Act (1861) Amendment] ... ... | In Urdu | 3 p (1 a) |
| Ditto ditto ... | In Nagri | 3 p (1 a) |
| Act III of 1898 (Lepers) ... ... ... | In Urdu | 6 p (1 a) |
| Ditto ... ... . ... .. | In Nagri | 6 p (1 a) |
| Act IV of 1898 (Indian Penal Code Amendment) .. .. | In Urdu | 3 p (1 a) |
| Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April 1900 ... . ... | In Urdu | 1 e 1 4 (8 a) |
| Ditto ditto .. | In Nagri | R 1 6 (8 a) |
| Act VI of 1898 (Post Office) .. ... ... . | In Urdu | 3 a 3 p (1 a) |
| Ditto ditto | In Nagri | 3 a 3 p (1 a) |
| Act IX of 1898 (Live stock Importation) .. ... | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagr | 3 p (1 a) |
| Act X of 1898 (Indian Insolvency Rules) .. ... | In Urdu | 3 p (1 a) |
| Act I of 1899 [Indian Marine Act (1887) Amendment] | In Urdu | 6 p (1 a) |
| Ditto ditto | In Nagri | 6 p (1 a) |
| Act II of 1899 (Stamps), as modified up to 31st August 1905 .. | In Urdu | 7 a 6 p (1 a 6 p) |
| Ditto ditto .. | In Nagri | 7 a 6 p (1 a 6 p.) |
| Act III of 1900 (Prisoners), as modified up to 1st March, 1905 .. | In Urdu | 2 a 3 p (1 a) |
| Ditto ditto .. | In Nagri | 2 a 3 p (1 a) |
| Act IV of 1899 (Government Buildings) . .. | In Urdu | 3 p (1 a) |
| Ditto ditto . | In Nagri | 3 p (1 a) |
| Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment | In Urdu | 3 p (1 a) |
| Ditto ditto ... | In Nagri | 3 p (1 a) |
| Act VIII of 1899 (Petroleum), as modified up to 1st January 1903 . | In Urdu | 1 a 6 p (1 a) |
| Ditto ditto | In Nagri | 1 a 6 p (1 a) |
| Act IX of 1899 (Arbitration) .. ... .. .. | In Urdu | 9 p (1 a) |
| Ditto ditto .. | In Nagri | 9 p (1 a) |
| Act XI of 1899 (Court fees Amendment) .. .. ... | In Urdu | 6 p (1 a) |
| Ditto ditto .. | In Nagri | 6 p (1 a) |
| Act XII of 1899 (Currency Notes Forgery) ... ... ... | In Urdu. | 3 p (1 a) |

"3 Has the Court of Wards, which managed the property in 1309, 1310, and kharif of 1311 Fasli, allowed defendant a set off against what may have been due from him for rent of the guzara or nankar of Rs 700 per annum? If so, can that set off be now held null and void?"

On the first issue both Courts in India awarded the plaintiff half the Government revenue plus 10 per cent, plus rates and cesses, and in regard to this there was no appeal

On the second issue the Deputy Commissioner found that, for the period specified therein, the defendant, being in the third generation, was liable to pay to the plaintiff the whole Government revenue for Daryapur, plus local rates and cesses as claimed, but without the addition of any 10 per cent malikana

On the third issue he held that the Court of Wards had allowed the defendant a set off in 1309 Fasli, and in 1310 Fasli on account of the allowance of Rs 700 for maintenance, and that that set-off could not be held to be null and void

As the result of the Deputy Commissioner's decision a decree for Rs 2,853 9-0 was made in favour of the plaintiff

From that decree the plaintiff appealed to the Judicial Commissioner and the defendant filed cross objections to it under section 561 of the Code of Civil Procedure The Appellate Court (MR ROSS SCOTT, Judicial Commissioner, and MR W. F WELLS, Additional Judicial Commissioner) held, as to the second issue, that the plaintiff was entitled to recover the 10 per cent claimed, in addition to the amount awarded by the Deputy Commissioner, and that on the third issue the finding of the Lower Court as to the set off should be affirmed In other respects the plaintiff's appeal was dismissed, and also the objections taken by the defendants The result of these findings was that the decree of the Deputy Commissioner was increased by Rs 285, making Rs 3,138 9 0 in favour of the plaintiff

The material portions of the judgments were as follows —

MR WELLS said —

[1] Abadi Begam brought a suit to have it declared that she was entitled to hold rent free and it was ultimately held by this Court on the 9th May 1898 that she was to hold subject to payment of 25 per cent of the assumed rental that is to say one half the Government revenue plus 10 per cent *talukdari*

| | |
|---|---|
| Act XIV of 1895 (Pilgrim Ships) ... ... ... | ... In Urdu. 1 a. 3 p. (1 a.) |
| Act II of 1896 (Cotton-duties) ... ... ... | ... In Urdu. 1 a. 3 p. (1 a) |
| Ditto ... ... ... | ... In Nagri. 1 a. (1 a.) |
| Act VI of 1896 (Indian Penal Code Amendment) ... ... | ... In Urdu. 3 p. 1 a.) |
| Act VIII of 1896 (Inland Bonded Warehouses) ... ... | ... In Urdu 3 p. (1 a) |
| Ditto ... ... | ... In Nagri. 3 p (1 a) |
| Act XII of 1896 (Excise), as modified up to 1st August, 1905... | ... In Nagri. 3. a 3 p. (1 a) |
| Act I of 1897 (Act XXXVII of 1850 Amendment)... ... | ... In Urdu. 3 p. (1 a) |
| Ditto ditto ... ... | ... In Nagri. 3 p. (1 a) |
| Act II of 1897 (Criminal Tribes Amendment Act)... ... | ... In Urdu. 3 p. (1 a) |
| Act III of 1897 (Epidemic Diseases) ... ... ... | ... In Urdu. 3 p. (1 a.) |
| Ditto ... ... ... | ... In Nagri. 3 p. (1 a) |
| Act IV of 1897 (Fisheries) ... ... ... | ... In Urdu. 3 p. (1 a) |
| Ditto ... ... ... | ... In Nagri. 3 p (1 a.) |
| Act VI of 1897 (Negotiable Instruments Act Amendment) ... | ... In Urdu. 3. p (1 a.) |
| Ditto ditto ... | ... In Nagri. 3 p (1 a) |
| Act VIII of 1897 (Reformatory Schools) ... ... | ... In Urdu. 1 a. 3 p. (1 a.) |
| Ditto ... ... | ... In Nagri. 6 p (1 a.) |
| Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 | ... In Urdu. 9 p (1 a.) |
| Ditto ditto | ... In Nagri 9 p. (1 a) |
| Act X of 1897 (General Clauses) ... ... ... | ... In Urdu 1 a. (1 a) |
| Ditto ... ... ... | . In Nagri 1 a. (1 a) |
| Act XII of 1897 (Local Authorities Emergency Loans) ... | ... In Urdu 3 p. (1 a) |
| Ditto ditto ... | ... In Nagri 3 p (1 a.) |
| Act XV of 1897 (Cantonments) ... .. ... | ... In Urdu 3 p. 1 a) |
| Act I of 1898 [Stage-carriages Act (1861) Amendment] ... | ... In Urdu. 3 p. (1 a.) |
| Ditto ditto ... | ... In Nagri 3 p (1 a) |
| Act III of 1898 (Lepers) ... ... ... ... | ... In Urdu. 6 p (1 a) |
| Ditto ... ... ... ... | ... In Nagri. 6 p (1 a) |
| Act IV of 1898 (Indian Penal Code Amendment) ... ... | ... In Urdu 3 p (1 a.) |
| Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April 1900 .. ... ... ... ... | ... In Urdu. Re 1 4. (8 a) |
| Ditto ditto | ... In Nagri Re 1 6. (8 a) |
| Act VI of 1898 (Post Office) ... ... ... | ... In Urdu. 3 a. 3 p. (1 a) |
| Ditto ditto | ... In Nagri. 3 a 3 p. (1 a) |
| Act IX of 1898 (Live-stock Importation) ... ... | ... In Urdu 3 p (1 a) |
| Ditto ditto | ... In Nagri. 3 p (1 a) |
| Act X of 1898 (Indian Insolvency Rules) .. ... | ... In Urdu. 3 p (1 a.) |
| Act I of 1899 [Indian Marine Act (1887) Amendment] ... | .. In Urdu. 6 p (1 a) |
| Ditto ditto | .. In Nagri 6 p (1 a.) |
| Act II of 1899 (Stamps), as modified up to 31st August, 1905 | ... In Urdu. 7 a. 6 p (1 a 6 p) |
| Ditto ditto | ... In Nagri. 7 a. 6 p (1 a. 6 p.) |
| Act III of 1900 (Prisoners), as modified up to 1st March, 1905 | ... In Urdu. 2 a. 3 p. (1 a) |
| Ditto ditto | ... In Nagri. 2 a. 3 p. (1 a.) |
| Act IV of 1899 (Government Buildings) ... ... | ... In Urdu. 3 p. (1 a) |
| Ditto ditto | ... In Nagri. 3 p. (1 a) |
| Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment | ... In Urdu 3 p (1 a) |
| Ditto ditto | ... In Nagri. 3 p. (1 a) |
| Act VIII of 1899 (Petroleum), as modified up to 1st January 1900 | ... In Urdu 1 a. 6 p (1 a) |
| Ditto ditto | ... In Nagri 1 a 6 p. (1 a) |
| Act IX of 1899 (Arbitration) ... ... ... | ... In Urdu. 9 p. (1 a.) |
| Ditto ditto | ... In Nagri 9 p. (1 a) |
| Act XI of 1899 (Court-fees Amendment) ... ... | ... In Urdu. 6 p. (1 a) |
| Ditto ditto | ... In Nagri 6 p. (1 a.) |
| Act XII of 1899 (Currency Notes Forgery) ... ... | ... In Urdu. 3 p. (1 a) |

imagined that it was meant that there was some distinction and that in one set of circumstances the maintenance holder should have no transferable right and in the other they should, and therefore he assumed that the word meaning 'transferable' had been omitted after the second *aur*.

'Now there is no doubt that the Rule is extremely obscure If the words 'such persons' refer to both the second and third generat ons, they contra d ct and make nonsense of the provision that the second generation should pay 25 per cent On the other hand if they only refer to the third generation they, to some extent, contradict the prov sion as to that inasmuch as they direct that the th rd generation should pay not merely 50 per cent of the rental but should pay the Government jama plus 10 per cent , and the repetition of the provision for heritable right appears unnecessary

"It has been suggested that it was intended that the fourth generation should pay the Government jama plus 10 per cent, but there is nothing to indicate that this was the intention, and it must be understood that the words 'such persons' refer to the persons last ment oned, namely, the third generation From the example that is given at the top of page 221 (of the report in 7 Oudh Cases) it would appear that the words 'third generation for ever means third generation and their successors , and so there is no question of any change in the fourth generation

"It is not necessary now to consider whether the rule with regard to the second generation was correctly interpreted in the decision of the 9th of Ma 1898 As I have shown above, I doubt if it was I believe that it was intended by the rule that the second generation should only pay half the Government jama and nothing more but that matter has been finally disposed of.

"I th nk with regard to the third generation the rule must be held to mean that they should pay the Government revenue plus 10 per cent

"The plaintiff contends that under the rule he is entitled to 50 per cent of the rental entered in the jamabandi plus 10 per cent on that There is no the slightest justification for a claim of 10 per cent on the gross rental. In the former decision of this court it was held that the rental for the purpose of these rules must be taken to be twice the Government revenue, and I think we should follow this principle particularly with regard to the third generatio. it is clearly indicated in the rules that 50 per cent means the Government jama It is impossible to believe that the framers of these rules intended that th amount payable should be readjusted every year in accordance with the ris and fall of the rental.

'In the view I take the plaintiff would be entitled to what he has got from the Court below for 1311 and 1312 plus 10 per cent

'The last point taken in appeal is that the plaintiff should get Rs 1,400 which had been wrongly deducted by the Court of Wards on account of maintenance wh ch the plaintiff contends was not really due But that is not matter for decision in this case The plaintiff was represented by the Court o Wards and supposing the Court had each year paid Rs 700 in cash to th defendant and the defendant had an hour later paid it in as rent there could b no interference by the Rent Court, neither can interference be made when ther has simply been a paper transaction. If the plaintiff considers that th

| | | |
|---|---|---|
| Act XIII of 1903 (Lepers) | | In Urdu 3 p (1 a) |
| Ditto | | In Nagri 3 p (1 a) |
| Act XIV of 1903 (Indian Foreign Marriages) | | In Urdu 3 p (1 a) |
| Ditto | | In Nagri 3 p (1 a) |
| Act XV of 1903 (Extradition) as modified up to 1st December 1904 | | In Urdu 1 a 9 p (1 a) |
| Ditto | ditto | In Nagri 1 a 9 p (1 a) |
| Act I of 1904 (Poisons) | ... | In Urdu 6 p (1 a) |
| Ditto | | In Nagri 6 p (1 a) |
| Act III of 1904 (Local Authorities Loan) | | In Urdu 3 p (1 a) |
| Ditto | | In Nagri 3 p (1 a) |
| Act IV of 1904 (North West Border Military Police) | | In Urdu 9 p (1 a) |
| Act [illegible] of 1904 [Transfer of Property (Amendment)] | | In Urdu 3 p (1 a) |
| *Ditto* | *ditto* | *In Nagri 3 p (1 a)* |
| Act VII of 1904 (Ancient Monuments Preservation) | | In Urdu 9 p (1 a) |
| Ditto | ditto | In Nagri 9 p (1 a) |
| Act VIII of 1904 (Indian Universities) | | In Urdu 1 a 3 p (1 a) |
| Ditto | ditto | In Nagri 1 a 3 p (1 a) |
| Act X of 1904 (Co operative Credit Societies) | | In Urdu 1 a (1 a) |
| *Ditto* | *ditto* | *In Nagri 1 a (1 a)* |
| Act XI of 1904 (to revive and continue section 8 B of the Indian Tariff Act 1894) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act XIII of 1904 (Indian Articles of War Amendment) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| *Act XV of 1904 [Indian Stamp (Amendment)]* | | *In Urdu 3 p (1 a)* |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act I of 1905 [Local Authorities Loan (Amendment)] | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act II of 1905 [Indian Universities ((Validation)] | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| *Act III of 1905 (Indian Paper Currency)* | | *In Urdu 9 p (1 a)* |
| Ditto | ditto | In Nagri 9 p (1 a) |
| Act IV of 1905 (Indian Railway Board) | | In Urdu 3 p (1 a) |
| Act VI of 1905 (Court fees Amendment) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Act VII of 1905 (Bengal and Assam Laws) | | In Urdu 3 p (1 a) |
| Ditto | ditto | In Nagri 3 p (1 a) |
| Regulation I of 1890 (British Baluchistan Laws | | In Urdu 2 a (1 a 9 p) |
| Regulation V of 1890 (British Baluchistan Forests) | | In Urdu 2 a (1 a 6 p) |
| Regulation VI of 1893 (Hazara Forests) | | In Urdu 2 a (1 a 6 p) |
| Regulation VIII of 1896 (British Baluchistan Criminal Justice) | | In Urdu 9 p (1 a) |
| [illegible] t ce) | | In Urdu 2 a 3 p (1 a) |
| | | In Urdu 2 a 6 p (1 a) |
| [illegible] | | In Urdu 6 p (1 a) |
| Regulation VII of 1901 (North West Frontier Province) | | In Urdu 4 [illegible] 3 p (1 [illegible]) |

## V — MISCELLANEOUS PUBLICATIONS

| | | | |
|---|---|---|---|
| Table showing effect of legislation in the Governor General's Council during 1898 to 1900 | | | R 1 (1 a 6 p) |
| Ditto | ditto | during 1901 | 6 a (? a) |
| Ditto | ditto | during 1902 | 2 a 6 p (1 a) |
| Ditto | ditto | during 1903 | 14 a (? a) |
| Ditto | ditto | during 1904 | 4 a ( a) |
| Ditto | ditto | during 190[illegible] | 3 p (1 ) |
| Annual Indexes to the Acts of the Governor General of India in Council from 1854 to 1905 The price is noted on each | | | |
| *Report of Indian Law Commission 1879 Foolscap Boards* | | | 1 e 1 (5 a) |

meaning and effect of the rules of the British Indian Association and had rightly decided that the appellant's claim should be limited to the recovery of the Government revenue. There was no ground whatever for the contention that the gross rental due for each year was to be the basis of calculation of the 25 per cent and the 50 per cent. payable respectively by the second and third generations Such an interpretation might in any year possibly absorb all the provision for maintenance made for the relatives of the taluqdar.

The appellate court had also rightly held that the Rent Court was not concerned with the decision of the Court of Wards as to the set-off allowed as against the rent for the years 1309 and 1310, and that decision could not be challenged by the appellant in this suit Reference was made to Sykes' Compendium of Taluqdari Law, page 285, paragraph 3 of the letter there set out; and page 310: the Oudh Sub Settlement Act (XXVI of 1866) and an unreported judgment of 10th March 1898 (in suit No 78 of 1897, *Japaltar Singh* v. *Ram Rutton Lal*) as to the meaning of the word "rent."

*Ross* replied.

*1909, December 2nd* —The judgment of their Lordships was delivered by LORD SHAW :—

The question between these parties can be stated in short compass. The plaintiff (appellant) is taluqdar of Akbarpur, within which is included the village of Daryapur. As such taluqdar he holds superior proprietary rights in the village.

The defendant (respondent) holds, under the "provision for maintenance" which falls to be construed, the sub-proprietary rights in the village. His mother, Abadi Begam, enjoyed such provision for maintenance, being a sub-proprietor in the second generation. The defendant holds similar rights, being a sub-proprietor in the third generation. The payments due from these sub-proprietors to the taluqdar are, it is admitted, governed by the terms of the provision for maintenance

The document so falling to be construed is of some interest. It is a translation by the court translator of "Copy of Rules of Practice, framed by the British Indian Association with regard to suits instituted and decrees, passed therein," dated the 25th

# TABLE OF CASES REPORTED.

If the provisions for maintenance of relatives agreed to by the taluqdars and sanctioned by the British Indian Association are upon the same fixed basis then all parties, including relatives, the taluqdars, and the Government, can understand year after year, and be able to forecast, their exact financial position

Taking it, accordingly, that the Government revenue is 50 per cent of the assumed rental, that the provision for maintenance of relatives in the second generation is the enjoyment of the property, subject to a payment of 25 per cent of the assumed rental to the taluqdar, and that in the third generation the enjoyment of the property is subject to a payment of 50 per cent to the taluqdar, the result would simply be that in the third generation the sub proprietors in actual possession would relieve the taluqdar of the Government revenue which is the very same sum, viz, 50 per cent of the assumed rental They would, however, according to the Rule, as applicable to a provision for maintenance of a perpetual or heritable character, pay to the taluqdar an additional sum of 10 per cent As the payments to the taluqdar might not be regular, and, in any view, the taluqdar's responsibility to the Government is full and direct, whether he received such payments or not, this 10 per cent may be accounted for as a reasonable commission or insurance, and it is accordingly sanctioned by the Rules of the British Indian Association under construction, as well as by the Rules regarding sub settlements and other subordinate rights of property in Oudh scheduled to Act No XXVI of 1866

The whole of the above depends on the fundamental bulk figure being the assumed rental as described, and, if that bulk figure be so treated, it does not appear to their Lordships that there is much left to construe in the Rule

The taluqdar, the plaintiff (appellant) in the present case, however, maintains that what ought to be paid by the relatives of the second and third generations is not 25 per cent and 50 per cent respectively of the bulk figure mentioned, but of the actual rent for the particular years, and not merely of the rents as received or ingathered for those years, but of the amount of the rents demandable, whether received or not.

# TABLE OF CASES CITED

in this case: and, in their Lordships' opinion, he rightly held that "it is not within the province of a Rent Court to determine whether the maintenance was or was not payable"

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

The appellant must pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellant:—*Barrow, Rogers and Nevill.*

Solicitors for the respondent:—*T. L. Wilson & Co.*

J. V. W.

---

LAL KUNWAR (DEFENDANT) v. CHIRANJI LAL (PLAINTIFF).*

[On appeal from the High Court of Judicature at Allahabad.]

*Evidence—Proof of adoption—Presumption from non-appearance of plaintiff in Court as witness—Practice for each litigant to cause his opponent to be cited as a witness—Non-production of account books with entries made at ceremony of adoption—Unsatisfactory conduct of case.*

In this case, in which the only issue was whether an alleged adoption had taken place or not, the onus being on the plaintiff (respondent) to prove that he had been adopted, the Judicial Committee held that he had not discharged the onus upon him and reversed the decision of the High Court mainly on the ground that due weight did not appear to have been given to the conduct of the plaintiff, the improbability and inconsistency of the story told on his behalf, his absence from the witness box, and the non-production of all books and documents.

Having regard to the well known and often proved habits of the Indian people with regard to the keeping of accounts recording their most minute transactions, the non-production of any books in which anything connected with this ceremony (of adoption) was entered covered the plaintiff's case with suspicion. No effort was shown to have been made by either side to procure their production; no search for them or loss of them was proved; no explanation why they were not forthcoming

The species of advocacy tolerated by the Courts of Law in the United Provinces of India in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client in order that he himself may have the opportunity of cross-examining that client, with the result that, should the opponent refuse to be led into this trap, the parties, the principal witnesses, are never examined at all, condemned by the Judicial Committee as a vicious practice unworthy of a high toned or reputable system of advocacy, as embarrassing and perplexing judicial investigation, and, it was to be feared, too often enabling fraud, falsehood, or chicane to baffle justice. (1).

---

*Present:—Lord MACNAGHTEN, Lord ATKINSON, Lord COLLINS, Lord SHAW, and Sir ARTHUR WILSON.

(1) *See* Kishori Lal v. Chunni Lal, I. L. R., 31 All. 116, at page 122.

# INDEX.

sections 136, 141 and 142, and *Lakshman Govind* v. *Amrit Gopal* (1) The Government Gazette of 25th February 1899 was also referred to, which contained an entry that one Chiranji Lal had passed the middle class examination at that date in Division III. He was stated to have been at the Muzaffarnagar Government High School, which was where the respondent had been educated, and his father's name was given as "Ram Lal." And it was contended that the entry referred to the respondent, and showed that he had at that time given the name, not of his adoptive father, but of his natural father, which, it was submitted, was conclusive against his adoption as alleged in his plaint.

*DeGruyther, K. C*, and *Ross* for the respondent contended that the evidence fully proved the fact of his adoption, and was not rebutted by any reliable evidence adduced by the appellant. The adoption was set up in 1890 by Dhan Kunwar, the widow of Brij Lal, at the earliest opportunity; and it was not a case where the claim was held over for a long term of years and only put forward when a great part of the proof of it could not be produced. There was nothing to show that the "Chiranji Lal" mentioned in the entry in the Government Gazette was the respondent; it might have been another person of the same name. The respondent was not put into the witness box, because of the practice common in litigation in the United Provinces for each litigant to cause his opponent to be summoned as a witness with the design that each party should be forced to produce the opponent so summoned and thus give counsel the opportunity of cross-examining his own client (see *Kishori Lal* v. *Chunni Lal* (2). It was not therefore the same as where a plaintiff in England failed to support his case by his own evidence. The books of account were in the possession of Tej Ram, and could not be produced by the respondent. Reference was made to the Evidence Act (I of 1872), sections 33 and 145, *Miller* v *Madho Das* (3) and *Lakshman Govind* v. *Amrit Gopal* (1) as to the admissibility of evidence;

(1) (1900) I. L. R., 24 Bom., 591.
(2) (1909) I. L. R., 31 All., 116 (122); L. R., 36 I. A., 9 (13).
(3) (1896) I. L. R., 19 All., 76 (92): L. R., 23 I. A., 106 (116).

one would suppose, well accustomed to keep books and record events from which large pecuniary results might follow, and fully alive to the importance of preserving those records and producing them when engaged in legal controversies in which they might be decisive

These three Bohra Brahmins with several other families of Bohra Brahmins lived in the village of Jatari The adoption is alleged to have taken place on the 18th April 1889, some ten months before Brij Lal died He was at that time undoubtedly childless, and much unsavoury evidence was given as to the nature of the malady with which he was affected, and the reason why he despaired of having natural children The plaintiff was at that time between 4 or 5 years of age He was married 5 years after his adoption, and must, at the time of the institution of the present suit, have been about 20 years of age There were many important points on which he could have been examined, especially as to a certain extract from the Government Gazette of the North Western Provinces, dated the 25th February, 1899, in which it is recorded that one Chiranji Lal, whose father's name is given as Ram Lal, and whose school was given as Muzaffarnagar Government High School, had passed in the third Division. The special significance of this entry is obvious from this that the first time the alleged adoption was put forward in any of the many suits and legal proceedings instituted by these several parties was on the 8th April, 1890, under circumstances to be hereafter mentioned If that entry was framed on information supplied by the plaintiff or his father, Ram Lal, it was most damning to his case, as he is in it described as the son of his natural *father—not* of his adoptive father It was received in evidence without any evidence being given to identify the Chiranji Lal described in it as the plaintiff, and, indeed, before their Lordships, it was urged by counsel on his behalf that *non constat* but that the extract referred to a person other than the plaintiff, but of the same name The plaintiff, however, was never produced as a witness to sustain his own case and so help to discharge the burden of proof that rested upon him It is suggested that the presumption which would be drawn in this country to the

# APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir George Knox*

HAZARI LAL (DEFENDANT) v. DURGA PRASAD (PLAINTIFF) *

*Pre emption—Wajib ul-arz—Construction of document—Contract or custom.*

The pre emptive clause of a wajib ul arz ran as follows :—"*Aiyanda jari rakhna rawaj shafa ka hamko manzur hai*" *Held* on a construction of the wajib-ul arz that it denoted a record of custom and not of contract. *Tasadduq Husain Khan* v. *Ali Husain Khan* (1) distinguished

THE facts of this case were as follows :—

The plaintiff brought a suit for pre emption on the basis of a wajib ul arz prepared at the settlement of 1873. The pre-emptive clause of the wajib-ul arz was as follows :—"*Aiyanda jari rakhna rawaj shafa ka hamko manzur hai.*" The court of first instance held that the wajib ul arz recorded a pre existing custom and hence decreed the suit The court of first appeal, however, held that it was evidence merely of a contract, and that as the settlement for which the wajib-ul-arz had been prepared had expired, the plaintiff's suit must fail. The plaintiff appealed to the High Court The case came before Aikman, J, who allowed the appeal in the following judgment :—

"The sole question for decision in this appeal, which arises out of a suit for pre emption, is whether the clause in the wajib ul-arz upon which the plaintiff's claim to pre empt is based, is, as held by the court of first instance, the record of a custom, or, as held by the lower appellate court, the record of a contract. After carefully considering the terms of clause 8 of the wajib-ul arz, which contains the passage relied on, I think the interpretation put upon it by the first court is right In that passage the co sharers say :—'For the future we wish to continue the custom of pre emption' The words in the vernacular are :—"*Aiyanda jari rakhna rawaj shafa ka hamko manzur hai.*" I think the only inference to be drawn from these words is that there was in existence a custom of pre emption which the co-sharers wished to continue to prevail, just as they might have agreed amongst themselves to abrogate it by covenanting not to enforce it in future The mere statement in the clause that up to that time there had been no suit for pre-emption instituted and decided does not show that no claim of pre emption had been made and allowed The case relied on by the learned Subordinate Judge is clearly distinguishable from the present. I allow the appeal, and, setting aside the decree of the court below, restore that of the court of first instance The appellant will have his costs here and in the court below "

*Appeal No. 45 of 1909 under section 10 of the Letters Patent.

(1) Weekly Notes, 1903 p. 121.

proceedings authorized by it are instituted, the petition of objection to the mutation of names purports to be presented by the widow of Brij Lal for herself, and as guardian of Chiranji Lal, her adopted son, of Mauza Jatari The objection to the application for succession is similarly framed In each the fact of adoption is stated, no date however being given In addition to this, the widow Dhan Kunwar, on the 6th May, 1890, made a deposition in these proceedings in which she not only swore to the fact of the adoption, but described the ceremony at length The question of adoption was an entirely irrelevant issue in both these proceedings It was not, and could not have been, decided in either of them It was foreign to the real questions in controversy It was unnecessary and useless to raise it, unless indeed the real object was to make evidence in support of the adoption From that point of view it might, though an unscrupulous have been a sufficiently sagacious and effective step Ram Lal in his deposition in the present case, dated the 21st July, 1904 swore that he acted as general attorney for the widow for three or four years after his appointment, that he made the application of the 8th April, 1890, at the request of Dhan Kunwar, that it was at her instance that he mentioned the fact of the plaintiff's adoption, and that she made the statement already referred to in his presence before the Tahsildar This evidence having been given, and the above mentioned deposition of Dhan Kunwar having been received in evidence, the Subordinate Judge required the lady to be examined and took her evidence at the house of Babu Sheo Prasad The part of the evidence dealing with the matter runs as follows —

' I was examined before the Tahsildar of Khair Ram Lal misled me and took me there Tej Ram said to me that he would not have my name recorded Then Ram Lal sent Sundar nain (barber woman) to me sending word to me that I should execute a power of attorney in his favour and that then he would have my name recorded Then he sent Musammat Sundar to me for the second time He wanted me to state that I had adopted his son I said that we had always been on inimical terms. I then went to the house of Ram Lal for the purpose of having my name recorded Ram Lal took me to the tahsil Court His wife also accompanied me

And again —

' I was never on friendly terms with Ram Lal. Chiranji the plaintiff never came to my house When I went to the tahsil I was accompanied by Chiranji Lal and his mother and I stated what she said to me '

agree with the interpretation thus put upon the wajib ul arz. It has been contended before us that the words contained in the wajib-ul arz do not in reality differ from the words contained in the particular wajib-ul arz which was considered in the case of *Tasadduq Husain Khan* v. *Ali Husain Khan* (1), and that as in that case the words there used were held to indicate the making of a contract only amongst the co sharers and not the keeping alive of a pre existing custom, we should in this case construe the wajib-ul arz before us in the same way. Now, the wajib-ul-arz referred to in the case of *Tasadduq Husain Khan* v. *Ali Husain Khan* does differ in one material respect from the wajib-ul arz before us. Between the words "*rawaj*" and "*shafa*" there comes in the important word "*haq*" To that decision one of us was a party, and it was pointed out that every question of the kind must be governed by the language which is to be found in the documents under which rights of the kind arise, and the case law rarely is of much assistance to the court in determining such questions This has been repeatedly laid down In the present case we are concerned merely with the language of the wajib-ul arz before us. We have no doubt as to what the meaning of this wajib ul-arz is, namely, that there was a pre existing custom of pre-emption and that the persons who dictated that wajib-ul-arz did intend that that pre existing custom of pre-emption should continue We accordingly dismiss this appeal with costs.

*Appeal dismissed.*

---

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji*

KANHAI RAM AND ANOTHER (PLAINTIFFS) v MUSAMMAT AMRI AND OTHERS (DEFENDANTS) *

*Hindu Law—Succession—Stridhan—Property acquired by adverse possession.*

Where a Hindu female acquires a title to property by means of adverse possession, such property becomes her *stridhan* and descends as such to her heirs. *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (2) and *Mohun Chunder Sanyal* v *Kashi Kant Sanyal* (3) followed.

THE facts out of which this appeal arose were as follows:—One Salig Ram had two sons—Ganga Dan and Sheo Lal. Ganga Dan had a son named Khushal Ram, who died in his

---

* First Appeal No. 191 of 1908, from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 1st of June, 1908.

(1) Weekly Notes, 1903, p 121. (2) (1877) L R, 5 I. A, 1.
(3) (1897) 2 C. W. N, 161.

have been made by either side to procure the production of these books, no search for them, or loss of them, was proved, no explanation given why they were not forthcoming

Having regard to the well known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non production of any book in which anything connected with this ceremony was entered, covers the plaintiff's case with suspicion It was according to the plaintiff's witnesses a memorable event Wealthy members of the Bohra brotherhood hurried from villages scores of miles away to grace the ceremony, as if this child of 5 years old, the youngest of three sons, were some young potentate coming into his kingdom There was feasting and music, one witness stating, somewhat boastfully, that one might eat as often as one liked According to Ram Lal himself, 125 members of the brotherhood and 100 or 150 others were collected together in this little village of Jatari, yet none of the inhabitants of the village were produced, on behalf of the plaintiff, to prove that such a gathering ever took place, while, if the story of the numerous witnesses resident in the village and its vicinity, examined for the defendants, be true, this host of people must like some invisible spirits of the night have assembled and dispersed unseen The next matter which throws suspicion on the plaintiff's case is this On the 15th May, 1890, the Officiating District Judge of Aligarh had made an order granting a certificate of succession to Tej Ram, and refusing to decide the issue raised in that proceeding as to the adoption On the 18th September, 1890, the Assistant Collector made, in the mutation proceedings, an order refusing to decide the same issue and ordered the name of Tej Ram to be entered in the village papers in the place of Brij Lal On the 19th September, 1891, an application was made to the Subordinate Judge of Aligarh, that Dhan Kunwar be appointed guardian of the plaintiff in a suit brought by Ram Lal against Chiranji Lal and others, and an order was made that summonses for final disposal of it should be issued to the defendants directing them to attend in person or by pleaders on the 23rd November, 1891, and also directing that they should put in a written statement by the 17th November,

Ram, who died in his father's life time, leaving a widow, Musammat Ishri, him surviving. The other son of Salig Ram, namely Sheo Lal, had a son named Narain Das and his wife was one Musammat Amri, a defendant in the suit. Ganga Dan died in the year 1882 or 1883, leaving his daughter in law Musammat Ishri him surviving, who upon his death entered into possession of his property and continued in possession until the year 1899, when she died. It has been found by the court below, and there is no controversy as to this, that Musammat Ishri acquired an absolute title to the property of Ganga Dan by adverse possession.

---

Included in the prayers for relief is a prayer that 'having regard to the facts of the case, any additional relief or any relief in place of the relief sought which the court may be able to grant may also be granted." The court of first instance settled, amongst other issues, the issue whether Musammat Jamna Dei had been in adverse possession of the house for over 12 years and had become absolute owner at the time of her death and if so whether or not the plaintiff was entitled to inherit that property. He held that the plaintiff was entitled to succeed as the reversionary heir of Ram Chandra and Lachman, but that even if Musammat Jamna Dei became absolute owner by adverse possession for over 12 years that would make the property her personal property and in respect of it the plaintiff as her husband's nearest heir was entitled to succeed. On appeal the learned District Judge reversed the decision of the court below holding that in his plaint the plaintiff did not claim to be entitled to the property as the heir of Musammat Jamna Dei but that he merely claimed it as the nearest heir of Lachman and Ram Chandra. He says in his judgment that, finding that Musammat Jamna Dei had acquired title by adverse possession, he need not go into the other points as to whether the suit being brought on the present plaint, a decree in favour of respondent as heir of Jamna Dei could be passed. "It was not prayed that respondent should be put into possession of the property as heir of Musammat Jamna Dei no issue was struck as to whether the respondent was her heir, to decide which it might even be necessary to consider the question of *stridhan* the heirs being different according to the kind of *stridhan* the property in question was." This is altogether in our opinion too narrow a construction to place upon the language of the plaint. The plaintiff set forth all the facts material for the determination of his rights in respect of the property, and whilst he asked for proprietary possession as the nearest reversioner of Lachman and Ram Chandra he also asked that "having regard to the facts of the case any additional relief or any relief in place of the relief sought which the court may be able to grant may also be granted" to him. We think that the learned Additional Judge ought to have determined the question which was knit between the parties in the court of first instance namely, whether in view of the facts the plaintiff was entitled to inherit the property, whether as heir of Lachman and Ram Chandra or as heir of Musammat Jamna Dei. Before therefore we can determine this appeal we must refer the following issue to the

his name was therefore quite unnecessary, and there is too much reason to suspect that the whole proceeding was simply an attempt to manufacture evidence

Ram Lal, in his deposition made on the 7th September, 1899, stated that the plaintiff was then being educated at Muzaffarnagar Had the latter been produced as a witness and cross-examined on the contents of the Gazette of the 25th February 1899, which was filed on behalf of Lal Kunwar in the litigation of 1899 – and its existence thus well known to him—he might have possibly been able to explain who was his schoolfellow and namesake who had a father of the same name as his own

And if he had been obliged to confess that the person mentioned in the Gazette was no other than himself, it would have put an end to the suggestion that he was passed amongst his friends, associates and neighbours as the adopted son of Brij Lal—heir to what was for him comparative affluence Numbers of witnesses were produced on his behalf at the trial to prove that he was recognized amongst the brotherhood as the adopted son of Brij Lal, and several others were produced by the defendant, to prove that he was not so recognized, but no evidence whatever was given to show that he was ever regarded in his own village, at Muttra, or where he lived and was at school as the son of Brij Lal In the 10 years which elapsed from 1889 till 1899, his name never appears in any document as the latter's adopted son save only in the documents prepared under the supervision of his own father

These are the broad facts of the case At the hearing several depositions, made in previous suits by witnesses examined in the present suit were admitted in evidence without the necessary foundation for their admission having been laid The most vital points were not elucidated The most suspicious circumstances were not probed The most important and decisive documents were not produced Much discussion was devoted before their Lordships as well as in the Indian Courts, to petty discrepancies between the evidence of the different witnesses examined for the plaintiff, for instance, as to which of three pandits alleged to have been present at the ceremony of adoption, presided, and which assisted, or as to whether the

Procedure for these reasons:—Musammat Amri, the widow of Narain Das, entered into possession of her husband's property upon his death She made a gift of portion of it to one Gopal Sahai, whereupon the plaintiffs, claiming to be the reversionary heirs of Narain Das, instituted a suit to have this gift in favour of Gopal Sahai set aside as against them The gift was set aside on the ground that Musammat Amri had only a widow's life estate and was not entitled to dispose of the property of Narain Das beyond her life estate The court below was of opinion that the plaintiffs in that suit ought to have claimed the property which they seek to recover in this suit, but in this the learned Subordinate Judge is clearly in error The claim in the former suit to have the deed of gift set aside was based on a distinct cause of action It was not incumbent on the plaintiffs in it to join a claim to recover the property owned by Musammat Ishri

The preliminary grounds upon which the court below dismissed the suit are untenable, and it will be necessary therefore to remand the suit to that court for trial upon the merits We accordingly allow the appeal, set aside the decree of the court below, and remand the suit to that court under the provisions of order 41, rule 23, of the Code of Civil Procedure, with directions that it be readmitted in the file of pending suits and be disposed of according to law The appellants will have the costs of this appeal in any event All other costs will abide the event

*Appeal allowed and cause remanded*

---

*Before Mr Justice Richards and Mr Justice Tudball*

SADANAND PANDE (PLAINTIFF) *v* ALI JAN AND OTHERS (DEFENDANTS)*

*Act (Local) No III of* 1901 *(United Provinces Land Revenue Act) sections* 56 86—*Market Right to levy tolls—Cess*

*Held* that the levy by the owner of a private market of market dues at so much per head for every beast sold and of rent for land occupied by stalls is not illegal *Sukhdeo Prasad* v *Nihal Chand* (1) distinguished

THE facts of this case were as follows —

The plaintiff asked for a declaration that he was entitled to realize the income and profits of a certain fair jointly with the

* First Appeal No 198 of 1908 from a decree of Srish Chandra Basu Subordinate Judge of Ghazipur dated the 13th of June 1908

(1) (1907) I L R, 29 All 740

# APPELLATE CRIMINAL.

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain*

EMPEROR *v.* GULAB SINGH AND OTHERS *

*Act No. XLV of* 1860 *(Indian Penal Code) section 225B—Escape from lawful custody—Defaulting co-sharer arrested under warrant of Tahsildar—Rules of Board of Revenue, Rule 9, clause (2)—Act (Local) No III of* 1901 *(United Provinces Land Revenue Act), sections* 142, 143, 146.

Where a Tahsildar issued a warrant under section 146 of the United Provinces Land Revenue Act against certain defaulting co-sharers, and they were arrested, but subsequently escaped from detention, *held* that this was an escape from lawful custody within the meaning of section 225B of the Indian Penal Code. The Tahsildar's warrant was not illegal because the Board had directed that process should 'ordinarily' issue in the first instance against the lambardar.

THE facts of this case were as follows:—

Government revenue was due for the mahal in which Gulab Singh, Bishnath Singh, Chatar Singh and Baldeo Singh were co-sharers. They went to the tahsil and paid some money but in the meantime a subsequent instalment had fallen due. While returning from the Tahsil they were arrested under a warrant of the Tahsildar, but escaped from custody. It was admitted by the parties that revenue had not been paid for the mahal in which they were co-sharers, and that they were arrested, but escaped from the lock-up. The Magistrate of Jaunpur acquitted the accused, holding that the warrant should have, in the first instance, been issued against the lambardar, as provided for by rule 9 (2), Board's Circulars 2-III, and that, inasmuch as in this case the process was issued first against the co-sharers, they were not in lawful custody. The Local Government appealed.

Mr. *W. Wallach* (Government Advocate), for the Crown, contended that when revenue became due all the co-sharers jointly and severally became liable as defaulters (Land Revenue Act, section 143). Section 146(*b*) directed that the defaulter might be arrested. The Board's rule referred to could not override the provisions of the law; and even if the process was not issued against the lambardar, the issue of process against the co-sharers did not make it illegal, as under section 142 of the Land Revenue Act all co-sharers were jointly and severally

* Criminal Appeal No. 578 of 1909 from an order of acquittal passed by Maqbul Husain, Magistrate, first class, of Jaunpur, dated 8th of May 1909

assessed It would be defeating the intention of the law if such profits were allowed by a court without their being recorded in the manner indicated by those sections Moreover, Regulation VII of 1822 rendered the holding of private markets and levying of market dues illegal

RICHARDS and TUDBALL JJ —This appeal arises out of a suit in which the plaintiff asked for a declaration that he was entitled to realize the income and profits of a certain fair jointly with the defendants in proportion to his share in the village He further claimed to recover the sum of Rs. 2,415-9 9, the amount which the defendants had wrongfully realized and converted to their own use The facts found by the court below are shortly as follows —The fair was established some years ago jointly by the plaintiff and the defendants It was held on land which belonged to them jointly in certain proportions So far as the findings of fact are concerned we are in entire accord with the court below, in fact the evidence as to these facts has been practically admitted by the respondents' counsel The learned Judge, however, notwithstanding the finding of facts in favour of the plaintiff, held that, inasmuch as there had been no sanction by Government to the levying of tolls and market dues, their exaction was illegal, and on this legal ground he dismissed the plaintiff's suit It must be remembered that no question arises between the alleged owners of the market and the persons who are called upon to pay the market due, nor is there any question as to the rights of the owners of rival fairs or markets The defendants admittedly have been collecting and recovering the profits derived from the fair in question There is no doubt that if the taking of market tolls and customs is illegal, the learned Judge was right in refusing to make a declaration that the plaintiff was entitled, and the only question we have to consider in the present appeal is whether or not the taking of market dues and customs in a private market is legal The profits of the market are derived from levying toll of so much per head upon every beast bought and sold and also from persons who are granted the privilege of putting up stalls during the time the fair is held *Primâ facie* any person is entitled to charge persons who of their own free will and accord make use of his

of land revenue under the United Provinces Land Revenue Act, 1901. The learned Magistrate admitted the force of his argument and acquitted the accused. From this order of acquittal a petition of appeal has been filed by the Local Government, and it is contended that the Deputy Magistrate's interpretation of the law is wrong.

Under section 142 of Local Act No. III of 1901 all the proprietors of a mahal are jointly and severally responsible to Government for the revenue assessed thereon. When any instalment of such revenue falls in arrears, as is the case in the present instance before us, that arrear of revenue, as section 146 shows, may be recovered by one or more of the processes set out in section 146. One of those processes is the arrest and detention of the defaulter as defined in section 143 of the Act. The rules relating to recovery of arrears of land revenue do indeed lay down that in a *mahal* in which a *lambardar* has been appointed, process shall ordinarily issue against the *lambardar* in the first instance, but it would be straining the proper meaning of the word 'ordinarily' to hold that the intention of the Board was, and the intention of these rules was, that in every case process should issue against the *lambardar* in the first instance. The very use of the word 'ordinarily' shows that occasions may arise when it is found expedient to issue process in the first instance against the defaulter. It is for the Tahsildar to determine whether he shall, in order to recover the arrears, have recourse to the *lambardar* in the first instance or shall proceed against the defaulter direct. Whichever course he may adopt, his warrant is legal, and the arrest under it is legal and the escape from there is an offence.

A further contention is put forward that the intention of the Legislature in enacting section 146 was that the arrest and detention of the defaulter should follow and not precede the serving of writ of demand. We find ourselves unable to follow this contention. The words of section 146 are wide enough to authorise the issue of both processes against the defaulter, and there is nothing to limit the order in which they should issue. In many cases the service of the writ of demand would result in the escape of the defaulter, and in such cases the Tahsildar

meaning of one or other of the sections The learned Judge refers to the case of *Sukhdeo Prasad* v *Nihal Chand* (1) The point in question in the present appeal was not before the court in that case Some reliance was placed upon Regulation VII of 1822 We think it extremely doubtful that any of the provisions of the Regulation rendered the holding of private markets and the taking of market dues illegal, but even assuming that it did, we may point out the Regulation VII of 1822 is repealed by Act XIX of 1873 so far as it relates to these Provinces The learned Judge very properly decided most of the issues of fact There are, however, two issues which still remain to be decided before the appeal can be finally disposed of, namely, as to the amount realized by the defendants and what proportion of that amount the plaintiff is entitled to We accordingly refer the following issues to the lower court —

(1) What amount was realized by the defendants in respect of the fair mentioned in the plaint and for the years therein mentioned ?

(2) How much of the amount so realized is the plaintiff entitled to ?

The court below may, if it finds it necessary, take any additional evidence to dispose of these issues Upon the return of findings ten days will be allowed for filing objections

The objections taken on behalf of the respondents fail and are dismissed with costs.

*Issues remitted*

(1) (1907) I L R 29 All 740

of land revenue under the United Provinces Land Revenue Act, 1901. The learned Magistrate admitted the force of his argument and acquitted the accused. From this order of acquittal a petition of appeal has been filed by the Local Government, and it is contended that the Deputy Magistrate's interpretation of the law is wrong.

Under section 142 of Local Act No. III of 1901 all the proprietors of a mahal are jointly and severally responsible to Government for the revenue assessed thereon. When any instalment of such revenue falls in arrears, as is the case in the present instance before us, that arrear of revenue, as section 146 shows, may be recovered by one or more of the processes set out in section 146. One of those processes is the arrest and detention of the defaulter as defined in section 143 of the Act. The rules relating to recovery of arrears of land revenue do indeed lay down that in a *mahal* in which a *lambardar* has been appointed, process shall ordinarily issue against the *lambardar* in the first instance, but it would be straining the proper meaning of the word 'ordinarily' to hold that the intention of the Board was, and the intention of these rules was, that in every case process should issue against the *lambardar* in the first instance. The very use of the word 'ordinarily' shows that occasions may arise when it is found expedient to issue process in the first instance against the defaulter. It is for the Tahsildar to determine whether he shall, in order to recover the arrears, have recourse to the *lambardar* in the first instance or shall proceed against the defaulter direct. Whichever course he may adopt, his warrant is legal, and the arrest under it is legal and the escape from there is an offence.

A further contention is put forward that the intention of the Legislature in enacting section 146 was that the arrest and detention of the defaulter should follow and not precede the serving of writ of demand. We find ourselves unable to follow this contention. The words of section 146 are wide enough to authorise the issue of both processes against the defaulter, and there is nothing to limit the order in which they should issue. In many cases the service of the writ of demand would result in the escape of the defaulter, and in such cases the Tahsildar

meaning of one or other of the sections. The learned Judge refers to the case of *Sukhdeo Prasad* v. *Nihal Chand* (1). The point in question in the present appeal was not before the court in that case. Some reliance was placed upon Regulation VII of 1822. We think it extremely doubtful that any of the provisions of the Regulation rendered the holding of private markets and the taking of market dues illegal; but even assuming that it did, we may point out the Regulation VII of 1822 is repealed by Act XIX of 1873 so far as it relates to these Provinces. The learned Judge very properly decided most of the issues of fact. There are, however, two issues which still remain to be decided before the appeal can be finally disposed of, namely, as to the amount realized by the defendants and what proportion of that amount the plaintiff is entitled to. We accordingly refer the following issues to the lower court:—

(1) What amount was realized by the defendants in respect of the fair mentioned in the plaint and for the years therein mentioned?

(2) How much of the amount so realized is the plaintiff entitled to?

The court below may, if it finds it necessary, take any additional evidence to dispose of these issues. Upon the return of findings ten days will be allowed for filing objections.

The objections taken on behalf of the respondents fail and are dismissed with costs.

*Issues remitted.*

(1) (1907) I. L. R. 29 All., 740

family, mortgaged to Lachman Das a 4½ biswa share in a village, along with some other properties, situate in other villages, for the sum of Rs 12,000 with interest at Re 1-2-0 per cent per month On the 29th of July, 1881, the sons of Lachman Das obtained a decree against the executants of the mortgage and some other members of the joint family on foot of the mortgage of the 25th February, 1874, and on 28th April, 1885, got the 4½ biswa share of the village sold in execution of their decree and purchased it in the name of their mother Musammat Sohini Out of this share was formed afterwards a separate mahal of 4 biswas Later on a partition took place among the sons of Lachman Das and the 4 biswa share was allotted jointly to the plaintiff appellant Musammat Sham Dei, widow of one of the sons of Lachman Das, and Musammat Gobindi, widow of another son of Lachman Das There was an unrealized balance of the decree against Baljit and others amounting to Rs. 30,000 This fell to the share of Musammat Sham Dei alone.

On the 18th of January, 1880, Chandan Singh and two other members of the joint family, Kanhai Singh and Darjan Singh, had mortgaged a 2 biswa 6 biswansi share out of the 4½ biswa share of the village to one Bansi Dhar, but to the decree obtained by the sons of Lachman Das on the 29th July, 1881, Bansi Dhar had not been made a party On 9th August, 1884, Bansi Dhar obtained a decree on foot of his mortgage without impleading Lachman Das' heirs On the 16th of January 1895, Bansi Dhar applied for execution of his decree by sale of a 13 biswansi 6½ kachwansi share and Musammats Sham Dei and Gobindi were made parties in this application Sham Dei and Gobindi objected that they were no parties to the decree and their names were removed from the array of parties The execution proceedings were, however, proceeded with and the 13 biswansi 6½ kachwansi share was sold by auction and purchased by Bansi Dhar On the 18th of January, 1897, Bansi Dhar obtained possession of the share On the 4th of January 1899, Sham Dei and Gobindi brought a suit against the legal representatives of Bansi Dhar for possession of the 13 biswansi 6½ kachwansi share on the ground of their prior purchase This suit, though decreed by the lower court, was dismissed by the High Court in 1903 on the ground that Bansi Dhar was

shall, for every such offence, be punishable with fine, which may extend to five hundred rupees" It appears that in the year 1901 certain persons, members of the same family, submitted disputes about the division of the family property to the arbitration of another member of the same family, namely, Brij Bhukhan Saran This gentleman duly made and published his award, which was acted upon by the parties There are witnesses to the award, persons who signed expressly in that capacity Immediately under their signatures are the signatures of the applicants They signed under the head 'signature of the heirs" It is admitted that all the applicants, who thus signed the award, had already signed the submission to the arbitration Although it is not very material to the question before me, it may be mentioned that in 1908 it became necessary in another suit to produce the award It was objected to by one of the parties to the suit as not being stamped As the result of this objection a penalty of over Rs 4 000 was imposed, which on appeal to the Board of Revenue was reduced to Rs 2,200 The matter having become public in this manner, a criminal prosecution was instituted against the applicants under section 62 of the Indian Stamp Act, II of 1899, as already mentioned The result of the Sessions Judge's order being that the present applicants have been fined Rs 150 each, the question before the court is, whether under the circumstances the applicants signed the award "otherwise than as witnesses," *within the meaning of sub section (1), clause (b)* of section 62 of Act II of 1899 It is impossible to say that every person who writes his name on a document of this nature otherwise than as a witness has committed an offence under the Act, because, if that was so, even a Judge who signed the document as an exhibit would be liable to a fine It is a pity no definition is given in the Act as to the meaning of the expression "signing otherwise than as a witness" Supposing that in the present case the applicants had been no parties to the submission to arbitration and had signed the award as an agreement, and, notwithstanding the fact that they were no parties to the submission, they intended to be bound by the award, I think that they might be said to have signed the award otherwise than as witnesses, within the meaning of the section Again, if there had been some informality in the

family, mortgaged to Lachman Das a 4½ biswa share in a village, along with some other properties, situate in other villages, for the sum of Rs 12,000 with interest at Re 1-2-0 per cent per month On the 29th of July, 1881, the sons of Lachman Das obtained a decree against the executants of the mortgage and some other members of the joint family on foot of the mortgage of the 25th February, 1874, and on 28th April, 1885, got the 4½ biswa share of the village sold in execution of their decree and purchased it in the name of their mother Musammat Sohini Out of this share was formed afterwards a separate mahal of 4 biswas Later on a partition took place among the sons of Lachman Das and the 4 biswa share was allotted jointly to the plaintiff appellant Musammat Sham Dei, widow of one of the sons of Lachman Das, and Musammat Gobindi, widow of another son of Lachman Das There was an unrealized balance of the decree against Baljit and others amounting to Rs. 30,000 This fell to the share of Musammat Sham Dei alone

On the 18th of January, 1880, Chandan Singh and two other members of the joint family, Kanhai Singh and Durjan Singh, had mortgaged a 2 biswa 6 biswansi share out of the 4½ biswa share of the village to one Bansi Dhar, but to the decree obtained by the sons of Lachman Das on the 29th July, 1881, Bansi Dhar had not been made a party On 9th August, 1884, Bansi Dhar obtained a decree on foot of his mortgage without impleading Lachman Das' heirs On the 16th of January 1895, Bansi Dhar applied for execution of his decree by sale of a 13 biswansi 6½ kachwansi share and Musammats Sham Dei and Gobindi were made parties in this application Sham Dei and Gobindi objected that they were no parties to the decree and their names were removed from the array of parties The execution proceedings were, however, proceeded with and the 13 biswansi 6½ kachwansi share was sold by auction and purchased by Bansi Dhar On the 18th of January, 1897, Bansi Dhar obtained possession of the share On the 4th of January 1899, Sham Dei and Gobindi brought a suit against the legal representatives of Bansi Dhar for possession of the 13 biswansi 6½ kachwansi share on the ground of their prior purchase This suit, though decreed by the lower court, was dismissed by the High Court in 1903 on the ground that Bansi Dhar was

# APPELLATE CIVIL

*Before Sir John Stanley Knight Chief Justice, and Mr Justice Karamat Husain*

KANCHAN SINGH AND ANOTHER (PLAINTIFFS) *v* MANI RAM (DEFENDANT) *

*Pre-emption—Wajib ul-arz —Construction of document—Contract or custom*

The pre-emptive clause of a wajib-ul arz ran as follows — *Koi muqadma haq shafa ka dair nahin hua aiyanda ko jari rakhna haq shafa ka ham ko manzur hai* ' *Held* on a construction of the wajib ul arz that these words did not denote a record of a custom but merely of a contract to take effect in the future

*Tasadduq Husain Khan* v *Ali Husain Khan* (1) followed. *Hazari Lal* v *Durga Prasad* (2) distinguished

THIS was a suit for pre emption, based on the wajib-ul arz prepared at a previous settlement, alleging that the wajib ul arz recorded a custom of pre emption entitling him to pre empt the property, which had been sold to a stranger The defendant vendee pleaded, among other things, that the wajib ul arz in question recorded a contract which terminated at the expiration of the settlement at which it was prepared The terms of the wajib ul arz were as follows —" *Zikar intiqal haqiat baruye bai wo rehan wo hiba wo warasat worawaj haq shafa wo dastur izdawaj sani*

*Kuchh haqiat rehan nahin hai, aiyanda har hissadar ko apne juz wa kul haqiat ke intiqal ka ikhtiar hai, ab tak koi muqadma haq shafa ka dair nahin hua, aiyanda ko jari rakhna haq shafa ka ham ko manzur hai, jo hissadar apna haqiat farokht karna chahega to awal badast biradar haqiqi jo shamil zamindari ho, badahu pas hissadar jaddi, jo woh na len to pas hissadar patti, bahalat inkar unke, pas hissadar digar patti, agar woh na len to jiske hath chahega farokht karega*"

The court of first instance held that the document recorded a custom and decreed the plaintiff's suit The lower appellate court, however, held that it recorded a contract and not a custom. The plaintiff appealed to the High Court

Babu *Sital Prasad Ghose*, for the appellants, contended that the wajib ul arz was *prima facie* evidence of the existence of

* Second Appeal No 772 of 1908 from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly dated the 12th of June 1908 reversing a decree of Abdul Halim, Munsif of Aonla Faridpur dated the 29th of November 1907.

(1) Weekly Notes, 1908, p 121 (2) *Supra* p 187

kachwansi share in the village Dyanatpur, under a mortgage dated the 25th of February, 1874 The said mortgage was executed in favour of one Lachman Das by Baljit Singh, Sarup Singh, Chandan Singh and Gopal Singh Lachman Das, the mortgagee, died leaving four sons—Nand Ram, Dila Ram, Makund Lal and Khushi Ram The plaintiff Sham Dei is the widow of Makund Lal One of the defendants, Musammat Gobindi, is the widow of Khushi Ram The plaintiff Narain Das is alleged to be the adopted son of Makund Lal, but this adoption is denied, and the *question* whether he *is or is not* the *adopted* son of Makund Lal has not been raised in this appeal The learned advocate for the appellants has argued the case as if it were a suit by Musammat Sham Dei alone After the death of Lachman Das a suit was brought for sale on the basis of the aforesaid mortgage by the four sons of Lachman Das on the 24th of February, 1880 They obtained a decree for sale from this Court on the 29th of July, 1881, against the mortgagors and other members of their family, including Kanhai Singh and Darjan Singh The mortgage comprised, among other property, a 4½ biswa share in the village Dyanatpur This was sold by auction on the 20th of April, 1885, and was purchased by the decree holders in the name of their mother Musammat Sohini. The purchasers had the village partitioned, and the 4½ biswas share was formed into a 1 biswa mahal, which under a subsequent partition between the heirs of Lachman Das was allotted to the shares of Sham Dei and Gobindi It is alleged that after the sale of the 4½ biswa share and other property, a balance of Rs 30,000 remained due upon the decree, and under the partition referred to above, the decree was allotted to the share of Sham Dei alone On the 18th of January, 1880, Chandan Singh, Kanhai Singh, and Darjan Singh made a simple mortgage of 2 biswas 6 biswansis out of the 4½ biswas mentioned above, in favour of Bansi Dhar, the adoptive father of Piare Lal, defendant No 50 On the 1s of May, 1884, Bansi Dhar brought a suit upon the said mortgage against his mortgagors only and did not implead in it the heirs of Lachman Das On the 9th of August, 1884, he obtained a decree for sale and in execution of that decree caused a 13 biswansi and 6½ kachwansi share to be sold and himself purchased it on the 8th September, 1893. On the

desire to continue the right of pre emption, as showing that a pre-existing custom existed We do not so interpret these words The proper translation, we think, is "currency, or practice, of the right of pre emption and custom as to remarriage" We are unable to distinguish the language of the wajib ul arz in this case from that in the earlier case decided by us and must dismiss this appeal We accordingly dismiss it, but without costs as no one appears to represent the respondent

*Appeal dismissed*

## FULL BENCH.

*Before Sir John Stanley Knight, Chief Justice Mr Justice Richards and Mr Justice Tudball*

ARTHUR FLOWERS (PETITIONER) *v* MINNIE FLOWERS (RESPONDENT) AND THOMAS JOHN MOORE (CO RESPONDENT) *

*Act No IV of 1869 (Indian Divorce Act) section 3—Divorce—Jurisdiction—'Reside'*

*Held* that a mere temporary sojourn in a place there being no intention of remaining there will not amount to residence in that place within the meaning of section 3 of the Indian Divorce Act 1869 so as to give jurisdiction under the Act to the court within the local limits of whose jurisdiction such place is situated

THIS was a petition for dissolution of marriage The petitioner and the co respondent had at one time been stationed together at Meerut, and, being both free masons, were on terms of the greatest intimacy Subsequently the petitioner was transferred to Hyderabad (Scinde), the co respondent remaining in Meerut Whilst the petitioner was stationed at Hyderabad he had occasion to pay a short visit to Meerut The petitioner took his wife with him, and they stayed with the co respondent On this occasion the petitioner accidentally found a letter which led him to believe that the respondent had committed adultery with the co respondent The petition was filed in the court of the District Judge of Meerut, who heard the case and granted the petitioner a decree for dissolution of marriage The decree then came up to the High Court for confirmation The rest of the facts of the case are stated in the judgement

Mr *E A Howard*, for the petitioner

* Matrimonial Reference No 5 of 1909

that the suit is not maintainable There are other questions involved in the case The plaintiff claims Rs 5,100, alleging that amount to be part of the money due upon the mortgage of 1874, but as the mortgagees themselves have purchased portions of the mortgaged property, the joint nature of the mortgage has been severed and the owner of the 13 biswansi 6½ kachwansi share is only liable for that portion of the mortgage money which is proportionate to the aforesaid share of the mortgaged property This is one of the questions which the court below will have to determine and which it has not determined There are other questions also, for example, the question whether the 13 biswansi 6½ kachwansi share could be properly mortgaged by the persons who made the mortgage of 1874, and whether the mortgage of that share is a valid mortgage As all these questions have not been properly tried by the court below, and as the suit has been dismissed upon a preliminary ground and its decision on that point is in our judgment erroneous, we allow the appeal, set aside the decree of the court below and remand the case to that court under the provisions of order 41, rule 23, of the Code of Civil Procedure, with directions to re admit it under its original number in the register and dispose of it on the merits regard being had to the observations made above Costs here and hitherto will abide the event.

The objections under section 561 of Act No XIV of 1882, preferred on behalf of certain respondents, necessarily fail and are dismissed with costs to be borne by the objectors

*Appeal allowed and cause remanded*

petitioner with his wife was at Hyderabad in Scinde The temporary sojourn for a day or two in Meerut did not constitute residence The petitioner merely paid a flying visit to Meerut for a temporary purpose and not with any intention of remaining Mere casual residence in a place for a temporary purpose with no intention of remaining is not "dwelling" and where a party has a fixed residence out of the jurisdiction, an occasional visit within the jurisdiction will not suffice to confer jurisdiction by reason of residence Now the jurisdiction of the court depends upon the residence or last residence of the petitioner and his wife In section 3 of the Act a definition is given of the term "High Court," which is empowered by the Act to grant divorce and at the end of the first clause of the section we find the following —"In the case of any petition under this Act 'High Court' is that one of the aforesaid Courts within the local limits of whose ordinary appellate jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together,' and in clause (3) of that section 'District Court" is defined as meaning, "in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together" The learned counsel for the petitioner has been unable to show us that the last residence of the petitioner and his wife was at Meerut or within the jurisdiction of the District Judge of Meerut This being so, it appears to us that the learned District Judge had not jurisdiction to grant a divorce We may point out here that in all cases of this kind a District Judge ought to inquire into and set out in his judgment the facts relied on as giving jurisdiction to the court to pronounce a decree for dissolution of marriage see *Durand* v *Durand* (1) In the case of *Wingrove* v *Wingrove* (the same page of 14 W R) it was pointed out that in a suit for dissolution of marriage where at the time of the presentation of the petition the respondent does not reside within the jurisdiction of the court, the jurisdiction of the Judge and the right of the petitioner to present a

(1) (1870) 14 W R 416

and does not abandon it by leaving the village He has the right to occupy the house; he cannot sell it; if he sells it the vendee can get nothing more than the materials of the house; *Sri Girdharji Maharaj* v *Chote Lal* (1).

The plaintiff's contention was that the vendee was not entitled to reside in the house He might be entitled to take away the materials, but to nothing further.

Babu *Durga Charan Banerji* (with him Babu *Harendra Krishna Mukerji*), for the respondents The lower appellate court has found as a fact that there exists a custom in the village whereby a ryot can transfer his interests in the house which he occupies. The ruling in I L R 20 All, 248, is distinguishable from the present case In that case the house had been built with the permission of the zamindars, whereas in the present case there is nothing to show such permission So long as the house stands the tenant or his transferee has a right to occupy the same. Where there is evidence to establish a custom, even the transfer of the site is valid; *Muhammad Usman* v *Babu* (2)

There is no authority for the proposition that in any case where a tenant transfers his dwelling house, the vendee is entitled only to the materials, irrespective of the fact whether the house has been built either with or without the permission of the zamindar.

Dr *Tej Bahadur Sapru* replied

The Full Bench case in I. L R, 30 All, 311, lays down that the High Court is not bound by a finding of the lower court as to *the existence or non-existence of custom as if it were a finding on* a pure question of fact The main ground on which their Lordships proceeded in I. L R, 20 All, 248, is that an agricultural tenant could not make a transfer of his house in the *abadi* The question of permission or no permission is not material in the case The right to occupy is the personal right of the tenant, he cannot introduce a stranger into the house If the zamindar is the owner of the sites of all the houses in the zamindari it is not open for a tenant to say that he came

(1) (1898) I. L. R., 20 All., 248 (2) (1909) 6 A. L. J., 825.

and in the course of a suit they entered into a compromise on the 2nd March 1892 in which they specified the share each was entitled to. The compromise further recorded an agreement to the effect that if either party sold his share of the property, the subject matter of the litigation, the other party should have a right to pre-empt. The compromise was filed in court and a decree was passed in accordance with the compromise, but it did not embody the provision as to the right of pre-emption. On the 22nd April the defendant vendor Sumer Kunhi sold his share to Nur Khan, whereupon the plaintiffs brought the present suit on the basis of the agreement entered in the compromise of 2nd March, 1892. The defendants pleaded that as that portion was not embodied in the decree it was not admissible in evidence as it was not registered. The court of first instance held on the authority of *Biraj Mohinee Dasee* v. *Kedar Nath Karmakar* (1) and *Patha Muthammal* v. *Esup Rowther* (2) that the compromise should have been registered, and therefore was not admissible in evidence, and dismissed the suit. On appeal the District Judge was of opinion that the deed of compromise was a composition deed, but feeling himself bound by the rulings relied on by the Munsif dismissed the appeal. The plaintiffs appealed.

Babu *Peary Lal Banerji* (with him Munshi *Gokul Prasad*), for the appellants:—

The pre-emptive clause in the compromise merely gave the plaintiff a right to call upon the defendant vendor to execute a sale deed in his favour. That portion of the compromise did not create any interest in favour of the plaintiff in the property, but merely created in the plaintiffs a right to obtain a document, *viz*., a sale deed, which would create the interest. An agreement to sell did not create any interest in the property. He referred to section 54, Transfer of Property Act. When a completed agreement to sell was declared by the Legislature not to create any interest in the property, an agreement of the nature relied upon, which fell far short of the completed agreement contemplated by section 54, did not create any interest. A document which requires registration must be a document which

(1) (1906) I. L. R., 35 Calc., 1010. (2) (1900) I. L. R., 29 Mad., 365.

applying to the court below to frame a decree in conformity with the findings in the judgment. This has been done; and the learned Additional Judge has in pursuance of the application of the parties passed an order to the effect that the transfer of the house in question was limited to the sale of the materials of the house and the right of residence only, and he directed that this modification should be made in his decree. The case now comes before us for final determination. Whether or not a custom prevails in this village whereby the tenants of houses are empowered to sell the materials of their houses and the sites of the houses so long as the houses are standing is no doubt to some extent a question of law. This Court has jurisdiction to consider the evidence given in support of such a custom and determine whether or not that evidence is sufficient in point of law to establish a custom. This was so pointed out by our brother RICHARDS in the case of *Hashim Ali* v *Abdul Rahman* (1) In the case of *Ram Bilas* v. *Lal Bahadur* (2) a Full Bench of this court, of which one of us was a member, held that where a question arises as to the existence or non existence of a particular custom and the lower appellate court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and the High Court is entitled in second appeal to consider whether the finding is based on sufficient evidence In the case before us the applicants did not raise any question in their grounds of appeal as to the sufficiency of the evidence upon which the decrees of the courts below are based We think that a custom such as is sought to be set up in this case ought to be established by clear and cogent evidence. The courts below examined a great number of documents, both sale-deeds and mortgages, and in addition to these, they had before them decrees, including a decree of this Court, in which the right claimed was recognised. A mass of evidence was adduced in support of the alleged custom. In view of the evidence, we are not prepared to say that the decision of the courts below that the custom set up does prevail was based on insufficient or on illegal evidence, and

(1) (1904) I. L. R., 27 All., 603 (2) (1907) I. L. R., 30 All., 311.

District Judge expressed some doubt as to the correctness of the rulings in question, but held that he was bound by those rulings in the absence of any ruling to the contrary by this Court He therefore affirmed the decision of the court of first instance

The appeal now before us was preferred by the plaintiffs, and the only ground of appeal is that the *sulahnama* (i e, the agreement of the 2nd of March 1892) did not require registration That document undoubtedly declared the rights of the parties in immovable property of the value of Rs 100 and upwards and was therefore compulsorily registrable But it is argued that the provisions contained in it as to pre emption were not required to be registered, and that inasmuch as a decree was passed determining the rights of the parties in the immovable property, the document was admissible in evidence to prove the right of pre emption claimed, that, in other words, the document may be divided into two parts, one of which required and the other did not require registration within the meaning of the Registration Act We think there is no force in this contention Section 49 of the Registration Act provides that no document required by section 17 to be registered shall affect any immovable property comprised therein or "be received as evidence of any transaction affecting such property" The *sulahnama* in so far as it purported to create a right of pre-emption was a transaction affecting property within the meaning of this section, and in our opinion it was rightly held that, as the document was not registered, no evidence of its contents could be given to establish a claim of pre-emption. In the unreported case of *Musammat Fatima Bibi* v *Mirza Sadr ud din Beg* (1), which was decided by a Bench of this Court, of which one of us was a member, on the 9th of March 1904, a similar question was dealt with In that case a contention similar to the one which has been raised before us by the learned vakil for the appellants was raised In the judgment we find the following passage dealing with this contention —" But turning to the decree of September 17th, 1892, we find that the only parts of the compromise incorporated in it are those in which consent is given to the passing of a decree for Rs. 24,375

(1) F. A. No 57 of 1902

lower court for trial on merits The suit was tried and was finally decreed in favour of the plaintiff in 1904 The decree holder thereafter made an application on the 19th August, 1905, for sale of the properties attached in 1898 One Hamid Husain filed an objection under section 278 of the Code of Civil Procedure, 1882, to the effect that he had purchased the properties attached from Fakhr ud-din and his sister in 1898 and 1905, respectively His objection was allowed on the ground of possession The decree-holder therefore brought the present suit for a declaration that Hamid Husain had no interest in the property The defence, among other things, was that the suit was barred by section 244 Civil Procedure Code, 1882 The Subordinate Judge, holding that that section did apply, dismissed the suit The plaintiff appealed to the High Court

Mr *M L Agarwala* (for Mr *B E O'Conor*) and Maulvi *Ghulam Mujtaba*, for the appellant —Section 244 of the Civil Procedure Code 1882 did not bar the suit The attachment made in 1898 ceased to exist after the decree of the 19th February, 1898, under which that attachment had been made, was set aside by the High Court The purchase of Hamid Husain was not at all affected by that attachment He did not become the representative of the judgment-debtor within the meaning of section 244 Civil Procedure Code, because the attachment during the subsistence of which he purchased the property was invalid and had no binding effect upon the parties

Mr *W Wallach*, with him Babu *Lalit Mohan Banerji*, for the respondents, replied

STANLEY, C J, and BANERJI, J —This appeal arises out of a suit brought under section 283 of Act No XIV of 1882 under the following circumstances One Fakhr ud-din had two wives, namely, Musammat Latif-un nissa and Musammat Shakur un nissa. The latter died in 1894 and on her death Ghafur ud-din plaintiff appellant her brother, brought a suit claiming one half of the amount alleged to be her dower He got an *ex parte* decree against Fakhr ud din on the 19th of January, 1898, and in execution of that decree caused certain property to be attached in February, 1898 Fakhr ud din appealed against the decree to this Court and thereupon the case relating to the execution of th

was allowed on the ground that only property which had come to the judgment debtors by inheritance was attachable and the execution against village Sumaria was dismissed on the 19th of July 1902 The decree holder then attached and sold such property in the hands of the judgment debtors as had descended to them by inheritance and realized various sums of money, but his decree remained unsatisfied He then applied for review of the judgment in the case in which he had obtained the decree, but the application was dismissed on the 31st of March 1905 He then put in the present application in March 1909, and sought to attach other villages in the hands of the judgment debtors (whose estate was then under the Court of Wards) which had come to them by survivorship It was objected that the order of the 19th of July 1902 operated as *res judicata* The lower court dismissed the objection on the ground that the previous order related to another village, Sumaria, and also on the ground that under section 53 of the new Code of Civil Procedure such property was liable to sale The judgment-debtors as represented by the Court of Wards appealed

Mr *A E Ryves* for the appellants —

Section 53 of Act V of 1908 had no application, as the rights of the parties had been decided by the order of the 19th of July 1902, which had become final The executing court had interpreted the decree and ruled that according to the decree only such property would be liable as had come to the judgment debtors by the right of inheritance That court decided that property which had passed to the judgment debtors by survivorship was not liable under the decree Section 53 could not have any retrospective effect, and could not give to a party a right which had been taken away by a final decree The decision of the 19th of July 1902 had the effect of *res judicata* He relied on *Behari Lal* v *Majid Ali* (1) and Caspersz, Estoppel and Res judicata (last edition) p 300 The mere fact that other villages were sought to be attached made no difference, as they fell within the same category, that is, villages which had come to the judgment debtors by survivorship The material issue was the same, namely, whether villages which fell under that category were liable He cited *Krishna Behari Roy* v *Brojeswari Chouranee* (2)

(1) (1897) I L R 24 All 138 (2) (1875) L R 2 I A 283

of Civil Procedure, 1882, and this suit was maintainable against the defendant. We accordingly allow the appeal, and, as the suit was dismissed upon a preliminary ground and the decision of the Court below on that ground is erroneous, we remand the case to that Court under order 41, rule 23, of the Code of Civil Procedure, with directions to re-admit it under its original number in the register and to dispose of it on the merits. Costs here and hitherto will follow the event.

*Appeal allowed and cause remanded.*

## REVISIONAL CRIMINAL.

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain.*

GANGA SARAN SINGH AND OTHERS v. BHAGWAT PRASAD.*

*Criminal Procedure Code, sections 145, 439 —Defect in form of written order—Jurisdiction—Revision.*

Where in proceedings under Chapter XII of the Code of Criminal Procedure the initial order was defective in that it did not set forth the grounds for the Magistrate being satisfied of the existence of a dispute likely to cause a breach of the peace, but on the other hand both parties were fully cognizant of the matter in dispute and there was in fact danger of a breach of the peace, the High Court declined in revision to interfere with the Magistrate's order.

THIS was an application for revision of an order purporting to have been passed under section 145 of the Code of Criminal Procedure by a Magistrate of the first class. The facts of the case appear from the following judgment of Tudball, J., before whom the case was first argued.

"This application for revision arises out of proceedings purporting to have been taken by a Magistrate under section 145, Criminal Procedure Code, in respect to certain lands. The sole point urged is that the Magistrate did not record an order in writing under section 145 of the Code, stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning the plots in question.

"The history of the case is briefly as follows:—The land in dispute was a fixed rate tenure partly cultivated by sub-tenants. On 30th March, 1905, Chattardhari Singh and Bhagwat Prasad Singh obtained a decree against the applicants Ganga Saran Singh, etc. In execution thereof this land was put to sale and purchased by the decree holders on 25th March, 1908, and on 12th July, 1908, the Amin put them into actual possession of the lands not in the hands of sub-tenants and into symbolical possession of such as was held by such sub-tenants.

* Criminal Revision No. 333 of 1909 against the order of W. T. M. Wright, Magistrate, first class, of Mirzapur, dated the 26th of April 1909.

have passed to his judgment-debtors by way of inheritance from Raja Narain Singh The decree has been interpreted in this sense as between the parties, and that interpretation has become *res judicata* between them The subsequent alteration in the law can have no effect as regards this question, namely, what did the court which passed the decree intend to give to the decree-holder and what rights were actually given him by the said decree We, therefore, are of opinion that this appeal must prevail We set aside the order of the lower court and dismiss the application for execution The appellants will get their costs throughout.

*Appeal decreed*

---

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Piggott*

KESHO DAS AND ANOTHER (DEFENDANTS) v MAKSUDAN DAS (PLAINTIFF) *

*Landlord and tenant—Denial of lessor's right to sue—Estoppel*

*Held* that a tenant who had taken a lease from one of several trustees was not competent to deny his lessor's right to sue alone for the rent *Musammat Purnia* v *Torab Ally* (1) and *Jainarayan Bose* v *Kadimbini Dasi* (2) referred to

THE plaintiff respondent brought a suit for the recovery of arrears of rent for 1312 Fasli to 1314 Fasli as one of the superintendents of a certain temple The defence was the admission of the liability, but denial of the plaintiff's right to recover the amount, as there were other trustees who were not brought on the record and who had served notice on the defendants not to pay the arrears to the plaintiff alone. The courts below decreed the claim. The defendants appealed.

Pandit *Mohan Lal Sandal* (with him Babu *Durga Charan Banerji*) for the appellants

Babu *Sarat Chandra Chaudhri* (for Babu *Jogindro Nath Chaudhri*), for the respondent

STANLEY, C J, and PIGGOTT, J —There is no force in this appeal The plaintiff's suit was brought to recover arrears of rent due by the defendants under a letting made to them by the plaintiff. It is found by the lower appellate court that the

---

* May, [illegible]

(1) 3 Wyman, 14 (2) (18[illegible]) 7 B L R 723

information of the reasons which have induced the Magistrate to take action and are able to make their defences properly. It seems to me clear that the only object of causing the Magistrate to set forth his reasons is to enable the parties to know what case they have to meet. In this present case, the applicants themselves (and to their knowledge their opponents also) had informed the Magistrate that the dispute which had already led to one riot was likely to lead to another breach of the peace. The Magistrate in the end maintained the other side in possession, and so the applicants who have not been in the slightest degree prejudiced by the Magistrate's omission to record his reasons in full, have come here on revision. They urge that by reason of this omission it must be taken that the Magistrate acted without jurisdiction. Stress is laid on the ruling in *Nittya Nand Roy* v. *Paresh Nath Sen* (1) wherein it was held that where the Magistrate omits in his initial order under this section to state the grounds of his satisfaction, the final order is without jurisdiction. Attention is also called to the decision of the learned Chief Justice in *Darab Kuar* v. *Fateh Chand* (2). In the latter case there was much more than a mere omission to record the reasons of the Magistrate's satisfaction. The latter officer in no way followed the procedure laid down in Chapter XII, and this Court held that his whole action was illegal and without jurisdiction, not being based on any law in existence. It might possibly, however, be inferred from the judgment that the learned Chief Justice would have held the final order to be without jurisdiction even if only the initial order were defective, though this is by no means clear. In *Har Prasad* v. *Padurang* (3) RICHARDS, J., held that though the initial order did not set forth the Magistrate's reasons as explicitly as it might have done, still there had been a substantial compliance with the requirements of the law, and he refused to interfere. That case was in other respects distinguishable from that of *Darab Kuar* v. *Fateh Chand*. In *Bihari Lal* v *Chhajju* (4), KNOX, J., held that where there was no order setting forth the Magistrate's reasons for being satisfied that a dispute likely to cause a breach of the peace existed, the proceedings were not such as are justified by Chapter XII of the Code. In the case of *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (5), the full Bench of the Calcutta High Court held that where an initial order made by a Magistrate under section 145 (1), Criminal Procedure Code, is not self-contained and does not expressly state the grounds of his satisfaction that a dispute likely to cause a breach of the peace exists, but refers to a police report in which such grounds are set forth, and on which the order is based, such order is not defective. The Full Bench, however, did not decide the second question which was referred to it by RAMPINI and MOOKERJEE, JJ. That question ran as follows:—"Whether when an initial order made by a Magistrate under section 145 (1) of the Criminal Procedure Code does not contain a statement of the grounds such order ought to be treated as made without jurisdiction or as an illegal order which vitiates the whole of the subsequent proceedings and renders void the final order under clause (6) of that section, or whether such a

(1) (1905) I. L. R. 32 Calc. 771.
(2) Weekly Notes 1907 p. 81 foot-note.
(3) Weekly Notes 1905 p. 270.
(4) (1905) 2 A. L. J., 274.
(5) (1896) I. L. R., 23 Calc., 352.

*Before Mr Justice Sir George Knox and Mr Justice Piggott*

NAKTA RAM AND OTHERS (DEFENDANTS) v CHIRANJI LAL (PLAINTIFF).*

*Civil Procedure Code (1882), section 13—Res judicata—Mortgage—Decree for redemption not providing for extinction of mortgagor's rights upon non-payment—Second suit for redemption*

Where a mortgagor brings a suit for redemption and obtains a conditional decree but omits to fulfil the condition imposed upon him he is not debarred from bringing a second suit for redemption unless the decree lays down that if he fails to fulfil these conditions the property will be sold or he will be debarred of all his rights to redeem *Rugad Singh v Sat Narain Singh* (1) distinguished.

THE facts of this case were briefly as follows —

One Karori Mal executed a usufructuary mortgage on behalf of himself and his minor brother, the plaintiff. Possession not having been given, the mortgagees sued both the brothers for possession In that suit the defence on behalf of the present was that there was no legal necessity justifying the alienation of his share and that he had not been benefited thereby The court found that there was legal necessity for only a portion, amounting to Rs 91, of the consideration, and that the present plaintiff had benefited to the extent of one half of it, and could, therefore, redeem his share on payment of Rs 45-8 0 The plaintiff accordingly deposited the sum of Rs 45 8 0, under section 83 of the Transfer of Property Act, but it was not accepted by the mortgagees This deposit was subsequently withdrawn from court, but not by the mortgagees The plaintiff, thereupon, brought, in 1884, suit for redemption and possession, and obtained a decree, but the decree omitted to specify what would by the consequence of non-payment by the decree holder of the mortgage money No steps were taken to execute this decree; but the present suit was brought in 1908 by the same plaintiff for redemption of the same property. The defendants objected, *inter alia*, that this suit was barred by section 244 and section 13, explanation II, of the Code of Civil Procedure of 1882. The court of first instance dismissed the suit On appeal the judgment was reversed, and the suit was remanded for trial under order XLI, rule 23, of Act V of 1908 The defendants appealed to the High Court against the order of remand

* First Appeal No 57 of 1909 from an order of H. W. Lyle, District Judge of Agra dated the 12th of May 1909.

(1) (1904) I L R 27 All, 178

# APPELLATE CIVIL

*Before Mr. Justice Sir George Knox and Mr. Justice Piggott.*

MUHAMMAD RAZI (DECREE HOLDER) *v.* KARBALAI BIBI AND OTHERS (JUDGMENT DEBTORS).*

*Civil Procedure Code (1882), section 230—Execution of decree—Limitation—Abatement of appeal—Terminus a quo.*

*Held* that an order declaring an appeal to have abated is in effect an affirmation of the decree of the Court below and limitation only begins to run against the decree holder from the date of such order and not from the date of the decree under appeal. *Mahomed Mehdi Bella* v. *Mohini Kanta* (1) followed. *Kewal* v. *Tikha* (2) *Rup Singh* v. *Mukhraj Singh* (3) and *Akshoy Kumar Mondi* v. *Chunder Mohun Chathati* (4) referred to. *Fazal Husain* v. *Raj Bahadur* (5) doubted.

THE facts of this case were as follows. On the 23rd of May, 1893, a decree was passed against one Muhammad Malih. On the 15th of February, 1894, this decree was affirmed by the District Judge on appeal. The judgment debtor appealed to the High Court, but died whilst his appeal was pending. An application was presented by one Mubarak Husain, who claimed to be the legal representative of the appellant, but on the 29th of March, 1897, the High Court held that there were other heirs of Muhammad Malih, namely, his daughters, who should have been brought upon the record. The High Court accordingly declared the appeal to have abated and gave costs to the respondent decree-holder. On the 11th of August, 1907, the decree holder applied for execution but was met with the defence that execution of the decree was barred by the rule of limitation laid down in section 230 of the Code of Civil Procedure, 1882. The court of first instance (officiating Subordinate Judge of Jaunpur) sustained the objection and dismissed the decree holder's application, and this decision was upheld on appeal by the District Judge. The decree holder appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *B. E. O'Conor*, for the respondents.

---

* Second Appeal No. [illegible] of 1909 from a decree of Muhammad Rafik, District Judge of Jaunpur, dated the 9th of December 1908, confirming a decree of Keshab Deo, Subordinate Judge of Jaunpur, dated the 7th of March 1908.

(1) (1907) I. L. R. 34 Calc., 674. (2) (1907) 5 A. L. J., 8. (3) (1885) I. L. R. 7 All., 887. (4) (1889) I. L. R., 16 Calc., 250. (5) (1897) I. L. R., 20 All., 124.

subsist. A deposit under section 83 was not equivalent to payment under section 93; and as a matter of fact payment was never made to the mortgagees. The language used in I. L. R, 27 All., 178, at page 181, relied upon by the appellants, was too wide. It was not intended to be laid down in that case that as soon as a deposit was made under section 83 the relation of mortgagor and mortgagee at once came to an end. If that were so, there would be no meaning in or necessity for the elaborate decree under section 92 or the provisions of section 93.

Babu *Sarat Chandra Chaudhri*, in reply:

By the words "*bad dilai jane,*" etc, the plaintiff only meant that the mortgagees might be ordered to take the money which was lying in deposit at their credit, nothing further remained to be done by him, and therefore the contingency contemplated by section 93 did not arise The wording of the decree was to be looked to and followed, and the terms of the decree clearly showed that it was one for possession.

KNOX and PIGGOTT, J. J.:—This was a suit for redemption of a mortgage. During the minority of the plaintiff there had been certain litigation between the parties which resulted in a finding that the mortgage debt due from the plaintiff amounted to only Rs 45-8-0. Upon this the plaintiff deposited this sum under section 83 of the Transfer of Property Act, and brought a suit for possession by redemption of the mortgage. This suit resulted in a decree, the correct interpretation of which is the main point for determination in this case. Execution of this decree was never taken out, and the deposit of Rs 45-8 0 is found to have been withdrawn from the Civil Court by some person other than the mortgagee These transactions took place in the year 1884 A.D. The plaintiff having now attained majority brings a fresh suit for redemption on payment of Rs 45 8 0. The question is whether this suit is maintainable in view of the fact that the decree of 1884 has been allowed to become time-barred. We were referred in the course of argument to the following rulings of this Court:—*Dondh Bahadur Rai* v. *Tek Narain Rai* (1), *Sita Ram* v. *Madho Lal* (2) and *Rugad Singh* v. *Sat Narain Singh* (3).

(1) (1899) I. L R, 21 All, 251 (2) (1901) I L R. 21 All., 44
(3) (1904) I. L. R, 27 All, 178

of the costs awarded against the appellant, and the incongruity of breaking up a single decree into a portion still capable of execution and a portion barred by limitation appears considerable. It seems to us that under the terms of section 230 of Act XIV of 1882, as well as on the balance of authority, the decree-holder in this case is entitled to the benefit of 12 years' period of limitation calculated from the 29th of March, 1897, when the final decree of the High Court was passed, which had the effect of affirming the decrees of the courts below. We therefore accept this appeal, set aside the decrees of the courts below and direct the court of first instance to proceed with the execution of the decree. The appellant will get his costs.

*Appeal allowed.*

---

## APPELLATE CIVIL.

---

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji.*

MATI-ULLAH KHAN (DEFENDANT) *v.* BANWARI LAL (PLAINTIFF) AND RAI DARIAO SINGH AND OTHERS (DEFENDANTS).*

*Act No IV of 1882 (Transfer of Property Act), section 74—Mortgage—Prior and subsequent mortgagees—Right of purchaser of mortgaged property in execution of decree of subsequent mortgagee who has paid off a first mortgage as against a second mortgagee suing for sale.*

A mortgaged certain property first to B and afterwards to C and finally sold it to D. D mortgaged the property to E, who paid off B's mortgages and brought the property to sale in satisfaction of his own mortgage, and it was purchased by M. *Held* on suit for sale on his mortgages by C, the second mortgagee, that M was entitled to hold up as a shield against C the mortgages in favour of B, which had been satisfied by E. *Kallu* v. *Sant Lal* (1), *Baldeo Prasad* v. *Uman Shankar* (2) and *Mamraj* v. *Ramji Lal* (3) referred to. *Baijnath* v. *Murlidhar* (4) distinguished.

THE facts of the case were as follows:—

Dariao Singh owned certain property, part of which he mortgaged to Bhola Nath by three bonds in 1894 and 1895. He subsequently executed two mortgage bonds dated respectively July 11th, 1897, and August 4th, 1898, in favour of Banwari Lal (plaintiff). On the 23rd of April 1900 Dariao Singh sold a

---

* First Appeal No 24 of 1903 from a decree of C. D. Steel, District Judge of Shahjahanpur, dated the 8th of October 1907.

(1) Weekly Notes, 1893, p. 120.
(2) (1907) I. L. R., 32 All., 1.
(3) (1909) 7 A. L. J., 15.
(4) Weekly Notes, 1907, p. 85.

subsist A deposit under section 83 was not equivalent to payment under section 93, and as a matter of fact payment was never made to the mortgagees The language used in I L R, 27 All, 178, at page 181, relied upon by the appellants, was too wide. It was not intended to be laid down in that case that as soon as a deposit was made under section 83 the relation of mortgagor and mortgagee at once came to an end If that were so, there would be no meaning in or necessity for the elaborate decree under section 92 or the provisions of section 93

Babu *Sarat Chandra Chaudhri*, in reply

By the words "*bad dilai jane,*" etc, the plaintiff only meant that the mortgagees might be ordered to take the money which was lying in deposit at their credit, nothing further remained to be done by him and therefore the contingency contemplated by section 93 did not arise The wording of the decree was to be looked to and followed and the terms of the decree clearly showed that it was one for possession

KNOX and PIGGOTT, J J —This was a suit for redemption of a mortgage During the minority of the plaintiff there had been certain litigation between the parties which resulted in a finding that the mortgage debt due from the plaintiff amounted to only Rs 45 8 0 Upon this the plaintiff deposited this sum under section 83 of the Transfer of Property Act, and brought a suit for possession by redemption of the mortgage This suit resulted in a decree, the correct interpretation of which is the main point for determination in this case Execution of this decree was never taken out, and the deposit of Rs 45 8 0 is found to have been withdrawn from the Civil Court by some person other than the mortgagee These transactions took place in the year 1884 A D The plaintiff having now attained majority brings a fresh suit for redemption on payment of Rs 45 8 0 The question is whether this suit is maintainable in view of the fact that the decree of 1884 has been allowed to become time barred We were referred in the course of argument to the following rulings of this Court —*Dondh Bahadur Rai* v *Tek Narain Rai* (1), *Sita Ram* v *Madho Lal* (2) and *Rugal Singh* v *Sat Narain Singh* (3).

(1) (1899) I L R 21 All 251 (2) (1901) I L R 21 All 44
(3) (1904) I L R 27 All, 178

Munshi *Govind Prasad* for defendant respondent, claimed to be exempted with costs.

Mr *A. E. Ryves*, in reply, cited *Kallu* v *Sant Lal* (1)

STANLEY, C J, and BANERJI, J —This appeal arises out of a suit for sale upon two mortgages made respectively on the 11th of July, 1897, and the 4th of August, 1898, by one Dariao Singh in favour of the plaintiff, Banwari Lal Dariao owned a 6½ biswa share in the village Serai Khas On the 18th of August, 1894, he mortgaged a 4 biswa share to one Bhola Nath On the 11th of December, 1894 he mortgaged 5 biswas to Bhola Nath, and on the 14th September, 1895, he mortgaged 1 biswa more to the same mortgagee After these mortgages he made the two mortgages in favour of Banwari Lal to which we have referred above On the 23rd of April 1900, Dariao sold to Prag Narain his interest in the mortgaged property, and he left Rs 2 600 with the purchaser for discharge of the mortgages held by Bhola Nath Prag Narain did not pay off those mortgages, but on the 16th of September, 1901, he made a mortgage of the property to one Hardwari Lal for Rs 3,300, and out of this sum Hardwari Lal withheld Rs 2,200 for payment to Bhola Nath With this money he discharged the mortgages held by Bhola Nath Hardwari Lal brought a suit for sale upon his mortgage and obtained a decree against Prag Narain In execution of that decree the mortgaged property was sold by auction and the appellant Mati ullah Khan became the purchaser In the suit out of which this appeal arises Banwari Lal prayed for the sale of the property purchased by Mati ullah Khan Mati ullah's defence was that he was entitled to hold up the mortgages of Bhola Nath as a shield against the claim of Banwari Lal The court below, relying upon the ruling of this Court in *Baij Nath* v *Murli Dhar* (2), has held that Mati ullah Khan has no right by virtue of his purchase to claim priority over the plaintiff

The correctness of this decision is impugned in this appeal, and it is urged that Mati ullah as standing in the shoes of Hardwari Lal is entitled to claim the benefit of the prior mortgages held by Bhola Nath which were discharged by Hardwari Lal This contention is in our judgment well founded

(1) Weekly Notes 1890 p 129 (2) Weekly Notes 1907, p. 85

pure and simple, it was for possession subject to payment of the sum deposited and to an order by the court directing the mortgagee to receive the same The decree passed is an anomalous one and not in strict conformity with the provisions of the Transfer of Property Act No doubt, as the learned District Judge remarks, this is due to the fact that the said Act had only recently come into force and the courts were not fully acquainted with its provisions No period is fixed within which the sum of Rs 45 8 is to be paid to the mortgagee and nothing is said as to the possible effect of non payment At the same time the decree as it stands is not one for possession pure and simple, and cannot be treated as such The relief sought is thus described —"That after payment of Rs 45-8 due on account of the mortgage in respect of the plaintiff's share one half share in the mortgaged property hereinafter specified be redeemed and possession thereof delivered to the plaintiff" It is provided that a decree ' for redemption of the mortgage" is passed in favour of the plaintiff The mere omission of the court to fix a time for payment does not seem to us to bring this case outside the principle already laid down

We accordingly dismiss this appeal with costs

*Appeal dismissed*

## APPELLATE CRIMINAL

*Before Mr Justice Tudball*

EMPEROR *v* SHEO SARAN LAL *

*Criminal Procedure Code sections* 233—236 239—*Misjoinder of charges—Illegality—Act No XLV of* 1860 (*Indian Penal Code*) *sections* 408 *and* 467

The accused was charged and tried at one and the same trial for three offences under section 408 of the Indian Penal Code committed within a period of one year and three offences of forgery under section 467 of the Code and was convicted and sentenced in respect of all the six offences

*Held* that this was an illegality not covered by section 537 of the Code of Criminal Procedure *Subrahmania Ayyar* v *King Emperor* (1) followed *In re Bal Gangadhar Tilak* (2) referred to and discussed

IN this case one Sheo Saran Lal clerk of the Kasia Co operative Bank in the district of Gorakhpur was charged with and

* Criminal appeal No 799 of 1909 from an order of F D Simpson Sessions Judge of Gorakhpur dated the 14th of July 1909

(1) (1901) I L R. 25 Mad 61 (2) (1903) I L R 33 Bom 221

The Court will take such additional evidence as may be necessary. On receipt of its findings ten days will be allowed for filing objections.

*Issues remitted.*

---

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji*
HAR DAYAL AND OTHERS (DEFENDANTS) *v* PIRTHI SINGH (PLAINTIFF) *
*Act No. IV of 1882 (Transfer of Property Act), section 83—Deposit paid to mortgagee—Balance of mortgage debt promised Mortgage not discharged.*

The consequences resulting from a payment into Court under section 83 of the Transfer of Property Act, 1882, only occur when the amount paid in is found to be or is accepted by the mortgagee as being equivalent to the full amount due under the mortgage in suit.

THE respondent brought a suit upon a mortgage dated the 17th of December, 1886, executed by the first set of the appellants The bond was for Rs. 1,300 and provided payment with compound interest at Re. 1-4-0 per cent. per mensem. He impleaded as defendants the mortgagors and certain purchasers of half the mortgaged property from the mortgagors under a sale deed dated the 20th of April, 1894. In July, 1895, they deposited Rs 2,725 in court under section 83 of the Transfer of Property Act, 1882, for payment to the mortgagee, respondent. In reply to this application, the respondent stated that Rs. 4,591-0-3 were due to him up to date and said :—

"He has deposited Rs. 2,725 for the opposite party and has shown his readiness to pay the remaining amount that may be found due according to account. It is therefore prayed that the said amount may be paid to the opposite party and the applicant be directed to pay the remaining dues to the opposite party under the said bond. The opposite side has no objection to take the whole account of the said bond, viz., Rs. 4,591 0-3, and return the said bond. The sum of Rs. 2,725 which the applicant has deposited for the opposite party may be paid to the opposite party. The opposite party will enter the payment of this sum on the reverse of the said bond. If the remaining amount is not paid to the opposite party he will seek his remedy in due course from the court."

Thereupon the pleader for the applicant stated :—

"The money due to the opposite party is not so much as he states. The applicant has deposited Rs 2,725. That sum may be paid to the opposite party. As for the rest the opposite party can seek his remedy in court. The vendor had left only that sum with my client for payment to the opposite party."

The following order was then made by the court :—

"That the amount deposited in the court be made over to the mortgagee and the mortgage deed be returned after noting the payment of the amount with

* First Appeal No. 60 of 1909 from a decree of Muhammad Ahmad Ali Khan, Additional Judge of Meerut, dated the 21st of January, 1909.

within the space of 12 months, contravenes the rule laid down in section 233, even when read with section 234. It has been argued, however, that section 235, clause (1), must be read with section 234, and that the three offences mentioned in the latter section must be deemed to include all the offences committed in three similar transactions such as are contemplated by section 235, clause (1); in other words, if an accused person goes through three similar transactions within the period of twelve months, committing in each transaction the same series of offences, he can be tried at one and the same trial on account of all offences committed in the course of the three transactions, even if they total more than three. I am of opinion that this would be too great an extension of the exception mentioned in section 234. A point connected with these sections came before the Bombay High Court in the case of *Bal Gangadhar Tilak* (1). The judgment in that case makes no reference whatever to clause (1), section 235. Clause (2) of that section and sections 237 and 239 were considered, no doubt, but the present point was not before that Court, and in my opinion, clause (1), section 235, and section 234 must be mutually exclusive. Even at the trial of *Bal Gangadhar Tilak*, the prosecution was restricted to three offences, although there were two similar transactions, in each of which two similar offences had been committed, and the accused had been committed for trial in respect of all four offences. To hold that section 234 covered all offences committed in the course of three similar but separate transactions when the number of offences was more than three would, in my opinion, be straining the language of the section beyond all bounds. Even in the trial of *Bal Gangadhar Tilak* the Bombay Court did not go to this extent, and in my opinion the trial of the present appellant in respect of six offences, three of embezzlement and three of forgery, is an illegality, as was laid down in the case of *Subrahmania Ayyar*(2).

In this view I think it would be improper to go into the merits of the case. I, therefore, admit the appeal, set aside the convictions and sentences and order the retrial of the appellant

(1) (1908) I. L. R., 33 Bom., 241. (2) (1901) I. L. R., 25 Mad. 61.

The court below has overruled these objections and has decreed the claim in full

The *defendants have preferred* this appeal, and the first contention raised before us by their learned counsel is that the mortgagee must be deemed to have received the Rs 2,725, deposited by the purchaser under section 83 of the Transfer of Property Act, in full discharge of the mortgage The circumstances under which the amount was received by the mortgagee are set forth in the *proceedings of the court, dated the 14th of September, 1895* It appears that the mortgagee refused to accept the amount deposited in full satisfaction of the mortgage and alleged that a much larger sum was due Thereupon the pleader for the purchasers, who deposited the mortgage money, stated that the amount deposited might be paid to the mortgagee and that for the balance if *any, the mortgagee* might seek his remedy in court It was upon these terms that the mortgagee received the money Therefore it cannot be said that he took it in full discharge of the mortgage, as mentioned in the second paragraph of section 83 of the Transfer of Property Act The order of the court was that the amount deposited be endorsed on the mortgage deed and that the mortgage deed be returned to the mortgagee

It is next urged that interest on the principal should not be charged after the date of the deposit of Rs 2,725 mentioned above The contention has no force If the amount due on the mortgage on the date of the deposit exceeded the amount of the deposit, interest was chargeable on the excess amount In this case the full amount of the mortgage was due, as the account shows The mortgagee was therefore entitled to interest on the said amount in accordance with the terms of the mortgage deed

Another contention on behalf of the appellants is that it has been proved by the evidence that a sum of Rs 600 was paid by the mortgagors to the mortgagee, shortly after the execution of the mortgage The evidence consists of the statements of one of the mortgagors *and of a single* witness This witness was disbelieved by the court below, and we see no reason to come to a different conclusion as to his credibility No receipt was taken and no endorsement of payment was obtained on the mortgage deed. We are not satisfied that Rs. 600 was paid as alleged.

section 21 of Act No. XII of 1887, and cited *Madho Das* v. *Ramji Patak* (1).

Babu *Sarat Chandra Chaudhri* (with him Babu *Jogindro Nath Chaudhri*), for the opposite party was not heard in reply, but cited *Ijjatulla* v. *Chandra Mohan Banerjee* (2).

KNOX and RICHARDS, JJ. :—The question which arises in this application is whether or not the learned District Judge was right in returning the memorandum of appeal, in an execution matter, to the judgment debtor appellant for presentation to the High Court. The suit out of which the execution matter arose was one to enforce payment of a mortgage by sale of the mortgaged property. The plaintiff valued his suit at Rs. 1,945. In the suit he claimed to recover his own mortgage for Rs. 1,000, together with interest thereon, and also stated that he wished to redeem two prior mortgages for the aggregate sum of about Rs 15,000 if the debt were found to be due. A decree was given in favour of the plaintiff for the sale of the property. The amount was directed to be paid by instalments On failure to pay the instalments, the plaintiff was to have the right to redeem the two prior mortgages and to sell the property for their amount as well as the amount of his own mortgage. There was a condition that he must make good the deficiency in court fees. Default was made, and the plaintiff made good the deficiency, acquiescing in the order of the court. After this was done, a question arose as to whether certain payments into court had or had not been made within proper time These objections were raised on behalf of the judgment-debtor. They were over-ruled by the court of first instance, and the judgment-debtor preferred an appeal to the District Judge against this ruling. The District Judge considered that the proper appellate court was the High Court and not the District Judge. He accordingly returned the memorandum of appeal for presentation to the High Court. The applicant here contends that valuation of his suit, that is, the original suit, was Rs. 1,945 and not the valuation after the deficiency had been made good. Section 21 of Act XII of 1887 provides as follows :—"Save as aforesaid, an appeal from a decree or order of a Subordinate

(1) (1894) I. L. R., 16 All., 286. (2) (1907) I. L. R., 34 Calc., 954.

The court below has overruled these objections and has decreed the claim in full

The defendants have preferred this appeal, and the first contention raised before us by their learned counsel is that the mortgagee must be deemed to have received the Rs 2,725, deposited by the purchaser under section 83 of the Transfer of Property Act, in full discharge of the mortgage The circumstances under which the amount was received by the mortgagee are set forth in the proceedings of the court, dated the 14th of September, 1895 It appears that the mortgagee refused to accept the amount deposited in full satisfaction of the mortgage and alleged that a much larger sum was due Thereupon the pleader for the purchasers, who deposited the mortgage money, stated that the amount deposited might be paid to the mortgagee and that for the balance, if any, the mortgagee might seek his remedy in court It was upon these terms that the mortgagee received the money Therefore it cannot be said that he took it in full discharge of the mortgage, as mentioned in the second paragraph of section 83 of the Transfer of Property Act The order of the court was that the amount deposited be endorsed on the mortgage deed and that the mortgage deed be returned to the mortgagee

It is next urged that interest on the principal should not be charged after the date of the deposit of Rs 2,725 mentioned above The contention has no force If the amount due on the mortgage on the date of the deposit exceeded the amount of the deposit, interest was chargeable on the excess amount In this case the full amount of the mortgage was due, as the account shows The mortgagee was therefore entitled to interest on the said amount in accordance with the terms of the mortgage deed

Another contention on behalf of the appellants is that it has been proved by the evidence that a sum of Rs 600 was paid by the mortgagors to the mortgagee, shortly after the execution of the mortgage The evidence consists of the statements of one of the mortgagors and of a single witness This witness was disbelieved by the court below, and we see no reason to come to a different conclusion as to his credibility No receipt was taken and no endorsement of payment was obtained on the mortgage deed. We are not satisfied that Rs. 600 was paid as alleged.

# APPELLATE CIVIL

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Piggott*

KURIYA MAL (PLAINTIFF) v BISHAMBHAR DAS (DEFENDANT) *

*Partition—Appeal—Appeal against preliminary decree after passing of the final decree*

After the passing of the final decree in a suit for partition, no appeal will lie which does not challenge the final as well as the preliminary decree *Mackenzie* v *Nar Singh Sahai* (1) followed *Uman Kunwari* v *Jarbandhan* (2) distinguished

THIS was a suit for partition of a house. On June 25th, 1908, the court of first instance, the Munsif of Ghaziabad, passed a preliminary decree in favour of the plaintiff, declaring his right to possession by partition of a half share in the house in suit On June 30th, 1908, the same court passed a final decree, giving the plaintiff possession of a specified half share in the house according to a plan which had in the meantime been prepared by a Commissioner, and adding certain orders as to costs, which had been held over at the time the preliminary decree was passed On July 28th, 1908, one of the defendants appealed to the court of the District Judge of Meerut against the preliminary decree of June 25th, 1908, without impeaching the final decree, which had in the meantime been passed The District Judge passed a decree which purported to be in modification of the decree of June 25th, 1908, and directed that the plaintiff's claim in respect of a one-fourth share in the house in dispute be dismissed, besides also modifying the order as to costs

The plaintiff appealed to the High Court and raised the preliminary point that no appeal would lie merely from the preliminary decree for partition, when a final decree had been passed

Munshi *Haribans Sahai* (with him Pandit *Mohan Lal Sandal*) for the appellant

Dr. *Satish Chandra Banerji* (for Babu *Jogindro Nath Chaudhri*) for the respondent

*Second Appeal No 1025 of 1908 from a decree of Louis Stuart District Judge of Meerut dated the 20th of August 1908 modifying a decree of Harihar Lal Bhargava, Munsif of Ghaziabad dated the 25th of June 1908

(1) (1909) I. L. R., 36 Calc, 762 (2) (1909) I. L. R, 30 All, 479.

and concluded that fictitious service of summons was suffici to constitute fraud and hence dismissed the appeal

The defendant appealed

Babu *Parmeshwar Dayal*, for the appellant The mere that there was no service of summons did not render the wh proceeding abortive Non service of summons was a m irregularity in procedure, it could not warrant the conclus that the claim of the defendant was fraudulent The utm that could be said of it was that it was a part of the scheme the means or one of the means by which the fraud was committ *Wahan* v *Banke Behari Pershad Singh* (1), *Pran Nath* v *Mahesh Chandra Moitra* (2) and *Khagendra Nath Mah* v. *Pran Nath Roy*, (3)

Attacking a decree *ex parte* on the ground of fraud service of summons was different from attacking it as fra ulent from beginning to end The one was a good grou for an application under section 108 of the Code of C Procedure, 1882, and the other for a regular suit If a per brings a suit to set aside an *ex parte* decree on the grou of fraud, he must clearly and conclusively prove the fa constituting the fraud, it cannot be inferred from the m fact of non-service of summons, Kerr on Fraud and Mista Ed 111, p 416, *Mahomed Golab* v *Mahomed Sulaiman* (4)

Babu *Balram Chandra Mukerji* (for Maulvi *Shafi uz-zama* for the respondent was not called upon

STANLEY, C J., and BANERJI, J —This appeal is conclu by the finding of fact of the lower appellate court The was brought by the plaintiff respondent to set aside a dec obtained by the defendant appellant in the Small Cause Co at Agra, the claim in that suit being to recover the price o gold ornament and also Rs 50, which is said to have b deposited with the plaintiff in this suit for payment to the dau ter of the appellant Daulat Ram brought the suit to have decree set aside on the ground that a fraud was practised him, namely, that he was not served with any summons, was in fact prevented from placing his case before the Ju of the Small Cause Court by the machinations of the appel

(1) (1903) I. L. R. 30 Calc 1021
(2) (1897) I. L. R., 24 Calc., 549
(3) (1902) I. L. R. 29 Calc 395
(4) (1894) I. L. R 21 Calc., 612.

Registered No 422.

VOL. XXXII.] [PART VI



# THE INDIAN LAW REPORTS.

JUNE 1910.

(Pages 227—287.)

## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY

Privy Council ... J. V. WOODMAN, *Middle Temple*
High Court, Allahabad ... W. K. PORTER, *Gray's Inn*



ALLAHABAD

PRINTED BY F. LUKER, SUPERINTENDENT, GOVERNMENT PRESS, AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT, UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

Price, Re. 1.

# THE INDIAN LAW REPORTS.

*Published in FOUR SERIES, viz—*

CALCUTTA, MADRAS, BOMBAY AND ALLAHABAD

The Indian Law Reports, published under the authority of the Governor General in Council, are printed in monthly parts, which are issued, as soon as possible after the first of each month, at Calcutta, Madras, Bombay and Allahabad, respectively

The reports compris

Court, a third for the

The cases heard by

for that High Court

to any High Court are reported in the Calcutta Ser es

The Calcutta Series is distributed by the Bengal Secretariat Book Depôt; and the Madr s, Bomb y and Allahabad Ser es are distributed direct from M dras, Bombay and Allahabad, respectively.

Persons desiring to subscribe for or purchase the reports should apply to—
the Officer in charge, Bengal Secretariat Book Dépôt, Calcutta, or
the Superintendent, Government Press Madras or
the Superintendent, Government Central Press, Bombay, or
THE CURATOR OF GOVERNMENT BOOKS, United Provinces, Allahabad.

PRICES.

The terms of subscription, and the terms on which current issues and back numbers are sold, are as follows —

| | Without postage | With Indian postage | With Foreign postage |
|---|---|---|---|
| | Rs a. p | Rs. a p. | Rs a p. |
| COMPLETE SERIES— | | | |
| Current issues per annum | — | 22 8 0 | 28 0 0 |
| Back numbers, per annum | 20 0 0 | 22 8 0 | 28 0 0 |
| CALCUTTA SERIES— | | | |
| Current issues, or back numbers per annum | 10 0 0 | 12 8 0 | 14 0 0 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | | |
| Current issues or back numbers per annum | 6 0 0 | 7 0 0 | 8 0 0 |
| ANY MONTHLY PART— | | | |
| Calcutta Series | 2 0 0 | 2 0 0 | 2 0 0 |
| Madras Bombay or Allahabad Series | 1 0 0 | 1 0 0 | 1 0 0 |

*All payments must be made in advance* Remittances to Calcutta should be addressed to the TREASURER, BENGAL SECRETARIAT, *Writers' Buildings, Calcutta.*

PARTS OUT OF STOCK AND DUPLICATE COPIES

WHEN a requisition is received for any set of the reports, and any Parts are out of stock the following deduction from the foregoing rates is made for such Parts —

| | Without postage | With Indian postage |
|---|---|---|
| | Rs a. p | Rs. a p |
| CALCUTTA SERIES | | |
| All Parts for one year | 7 2 6 | 8 6 3 |
| Any one Part | 0 8 9 | 0 10 3 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | |
| All Parts for one year | 4 4 6 | 4 11 3 |
| Any one Part | 0 5 3 | 0 5 9 |

If any Part is lost in transit to a subscriber, and the fact is reported to the office of distribution within three months from the date of publication a duplicate will be supplied at the following rate —

| | Without postage | With Indian postage |
|---|---|---|
| | Rs a p | Rs a. p |
| CALCUTTA SERIES | 0 8 9 | 0 10 3 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES | 0 5 3 | 0 5 9 |

REPRINTS

THE Complete Series for the years 1878 1879, 1880, 1882, 1884 1888 1890, 1891, 1895, 1896, 1897, 1899 1900 1901 and 1904 to 1909 has been reprinted and may be purchased at the Bengal Secretariat Book Dépôt, Calcutta either wholly or in part. All parts required to complete the stock of the Reports for other years are now being reprinted. Complete Reports from the beginning to date will therefore shortly be available at the Bengal Secretariat Book Dépôt.

ADVERTISEMENTS FOR THE CALCUTTA SERIES

ADVERTISEMENTS of law publications only are received Rates can be ascertained on application to the Bengal Secretariat Book Dépôt

# THE BENGAL LAW REPORTS.

SEVERAL volumes of the Bengal Law Reports from August 1868 to December 1875 and Full Bench Rulings Parts I and II, are available at the Bengal Secretariat Book Dépôt, Calcutta, at the following rates —

| | Without postage | With Indian postage |
|---|---|---|
| | Rs. a p | Rs. a p |
| BENGAL LAW REPORTS for one year | 20 0 0 | 22 8 0 |
| Single copies, each | 2 0 0 | 2 0 0 |
| FULL BENCH RULINGS, Parts I and II | 20 0 0 | 22 8 0 |

# BOOKS AND PUBLICATIONS FOR SALE

BY THE

# SUPERINTENDENT OF GOVERNMENT PRINTING, INDIA.

8, HASTINGS STREET CALCUTTA

*All books published by the Superintendent of Government Printing India can be purchased either directly or through the following or any other booksellers —*

AGENTS

CALCUTTA.—*Thacker, Spink & Co*
MADRAS —*Higginbotham & Co.*

BOMBAY— *Thacker & Co Ld* / *Radhabai Atmaram Sagoon*

NOTICE —*Books required for private use only can be purchased Application should be accompanied by a remittance unless it is wished that the books should be sent by value payable post, in which case besides the ordinary postage an additional charge will be made for registration and commission*

*Books required for the Public Service should be obtained through Local Governments*

---

☞ *The amounts within parentheses are for packing and postage*

---

# List of Books and Publications for sale which are less than two years old

---

## LEGISLATIVE DEPARTMENT.

---

These publications may be obtained from the Office of the Superintendent of Government Printing, India, No 8 Hastings Street Calcutta ]

THE PRICES OF THE GENERAL ACTS LOCAL CODES MERCHANT SHIPPING, DIGEST INDEX TO ENACTMENTS AND THE DIGESTS OF INDIAN LAW CASES 1901 TO 1907 (SEPARATELY AND PER SET OF FIVE VOLUMES) HAVE BEEN CONSIDERABLY REDUCED

THE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPARTMENT

### I —THE INDIAN STATUTE BOOK

REVISED EDITION

*Super royal 8vo cloth lettered*

#### B —GENERAL ACTS

| | | |
|---|---|---|
| General Acts of the Governor General of India in Council Vol I from 1834 to 1867 Edition 1909 | Rs 6 | (10 a) |
| General Acts of the Governor General in Council Vol II from 1868 to 1878 Edition 1909 | Rs 7 | (10 a.) |
| General Acts of the Governor General in Council Vol III from 1879 to 1886 Edition 1909 | Rs. 6 | (9 a.) |
| General Acts of the Governor General in Council Vol IV, from 1887 to 1897 Edition 1909 | Rs 6 | (9 a) |
| General Acts of the Governor General in Council Vol V from 1898 to 1903 Edition 1909 | Rs 6 | (9 a) |
| General Acts of the Governor General in Council Vol VI from 1904 to 1909 Edition 1909 | Rs 7 | (12 a) |

#### C —LOCAL CODES

The Bengal Code Third Edition 190[illegible] containing the Regulations and Local Acts in force in Bengal [illegible] Vols [illegible] to [illegible] Rs 6 a volume or Rs 30 reduced to Rs 20 for set of 5 Vols

The Bombay Code, Vol I, Third Edition, 1907 ... ... ... Rs 4. (8 a.)
Ditto Vol. II, Third Edition, 1907 ... ... ... Rs 6 (8 a)
Ditto Vol. III, Third Edition, 1908 ... ... ... Rs 5 (8 a)
Ditto Vol. IV. Third Edition, 1909 ... ... Rs. 4 (8 a.)
Volumes I to IV. Reduced to Rs. 11 per set.
The Coorg Code, Third Edition, 1908. ... ... ... .. Rs 2 (4 a.)
E B & Assam Code, Vol I, Edition 1907 ... ... .. Rs 6 (10 a)
Ditto Vol II, Edition 1907 ... ... ... Rs 6 (9 a)
Ditto Vol. III, Edition 1907 ... ... ... Rs 6 (9 a)
Volumes I to III reduced to ... .. ... ... ... Rs 16. (per set.)
The United Provinces Code, Volume I, Fourth Edition, 1906, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table. .. ... ... Rs 5 (8 a)
The United Provinces Code, Vol. II, Fourth Edition, 1906, consisting of the Acts of the Lieutenant-Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in, or extended to, the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874, with an Index. Rs 10 (Re. 1) for both Vols or Rs 5, (8 a) for each Volume.
The United Provinces Code, Vols I and II, reduced to Rs. 7 per set.

*In the Press*

A Digest of Indian Law Cases, 1908, by C E Grey, Barrister-at-Law.
A new edition of the Burma Code

## II – REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION

Act I of 1846 (Legal Practitioners), as modified up to 1st October, 1907. 2 a (1 a.)
Act XXXVII of 1850 (Public Servants Inquiries), as modified up to 1st August, 1908 ... ... ... 11 a. (1 a)
Act XXX of 1852 (Naturalisation of Aliens), as modified up to 30th April, 1908 ... ... ... ... ... 2 a (1 a)
Act XX of 1853 (Legal Practitioners), as modified up to 1st September, 1907. ... ... ... 1 a. 9 p (1 a)
Act XXIII of 1855 (Administration of mortgaged Estates), as modified up to 1st October 1908 ... ... 1 a 3 p (1 a)
Act XXIV of 1856 (Penal Servitude), as modified up to 1st January, 1909, 2 a (1 a.)
Act XIII of 1857 (Opium), as modified up to 1st August, 1908 .. 4 a 3 p. (1 a)
Act IX of 1859 (Forfeiture), as modified up to 1st October 1908 . 1 a 9 p (1 a)
Act XXIV of 1859 (Madras District Police), as modified up to 1st November, 1907 ... ... ... .. 3 a 6 p (2 a)
Act XVI of 1863 (Excise Duty on Spirits), as modified up to 1st October, 1908 ... ... ... .. ... 2 a (1 a)
Act XXXI of 1863 (Gazette of India) with footnotes ... ... 1 a 3 p (1 a)
Act X of 1865 (Succession), as modified up to 1st April 1909. Rs 1 8. ... (2 a)
Act XXI of 1867 (Sarais and Paraos), as modified up to 1st August, 1908 ... ... ... ... 2 a (1 a)
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907 ... ... .. .. 5 a (1 a)
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1909 ... ... ... . Rs 1-2, (3 a)
Act V of 1870 (Unclaimed Deposits), as modified up to 1st October, 1908 1 a. (1 a)
Act VII of 1870 (Court Fees), as modified up to 1st February, 1909 ... Re 1. (1 a)
Act XXVII of 1871 (Criminal Tribes), as modified up to 1st October, 1908 ... ... ... ... ... ... 5 a 3 p (1 a 6 p)

| | |
|---|---|
| V of 18 ? (Indian Articles of War) as modified up to 1st January, 1909 | Rs 1 2 0 (3 a) |
| ? of 1870 (Unclaimed Deposits) as modified up to 1 October 1903 | 1 a (1 a) |
| VII of 1870 (Court Fees) as modified up to 1st February 1909 | Rs 1 2-0 (2 a) |
| XXIII of 1871 (Pensions) as modified up to 1st September 1909 | 2 a 3 p (1 a) |
| XXVII of 1871 (Criminal Tribes) as modified up to 1st October, 1908 | ? a 6 p (1 a 6 p) |
| I of 1872 (Evidence) as modified up to 1st May 1908 | Re 1 (2 a) |
| IX of 1872 (Contract) as modified up to 1st February 1908 | 1 e 1 4 a (2 a) |
| IX of 1874 (European Vagrancy) as modified up to 1st September, 190? | ? a 0 p (1 a) |
| I of 1878 (Opium) as modified up to 1st October 190? | 5 a 6 p (1 a) |
| VI of 1878 (Treasure Trove), as modified by Act XII of 1891 as reprinted on the 14th February 1 08 | 2 a ? p (1 a) |
| VIII of 1878 (Sea Customs) as modified up to 1st June 1908 | Re 1 5 3 (4 a) |
| XI of 1878 (Arms), as modified up to 1st March 1910 | 6 a (1 a) |
| XVI of 187? (Transport of Salt) as modified up to 1st October, 190? | 1 a 6 p (1 a) |
| XIII of 1880 (Vaccination) as modified up to 1st September, 190? | 4 a 9 p (1 a) |
| XV of 1881 (Factories) as modified up to 1st April 1910 | 5 a 6 p (1 a 6 p) |
| XVIII of 1881 (Central Provinces Land Revenue) as modified up to 1st March 1909 | Rs 1 - ? (3 a) |
| XXVI of 1881 (Negotiable Instruments) as modified up to 1st September 1 0? | 10 a (1 a) |
| II of 1882 (Indian Trusts) as modified up to 1st June 1909 | 10 a (1 a) |
| XII of 188? (Salt) as modified up to 1st August 1909 | 7 a (- ?) |
| V of 1883 (Indian Merchant Shipping) as modified up to 1st September 1909 | 6 a (1 a) |
| IV of 1884 (Explosives) as modified up to 1st September 1908 | 4 a (9 p) (1 a) |
| IX of 1884 (Legal Practitioners) as modified up to 30th June 1909 | 1 a 6 p (1 a) |
| III of 1888 (Police) as modified up to 1st January 1 0? | 1 a 9 p (1 a) |
| II of 1889 (Measures of Length) with footnotes | 1 a 3 p (1 a) |
| IV of 1889 (Indian Merchandise Marks) as modified up to 1st August 1908 | 6 a (1 a) |
| VI of 1889 (Probate and Administration) as modified up to 1st January 1 09 | 2 a 9 p (1 a) |
| VI of 1890 (Charitable Endowments) as modified up to 1st August 1908 | 2 a ? p (1 a) |
| IX of 1890 (Indian Railways) as modified up to 1st June 1 0? | Re 1 2 0 (? a) |
| XI of 1890 (Prevention of Cruelty to Animals) with footnotes | 2 a (1 a) |
| XIII of 1890 (Excise Malt Liquors) as modified up to 1st October ? 1 09 | 1 a 6 p (1 a) |
| X of 1891 (Indian Penal Code Amendment) as modified up to 1st August 1909 | 1 a (1 a) |
| XII of 18?? (Indian Companies Memorandum of Association) as modified up to 1st August 190? | 2 a (1 a) |
| III of 1898 (Lepers) as modified up to 1st September 1909 | 4 a (1 a) |
| V of 1898 (Code of Criminal Procedure) as modified up to 1st August 1908 | 1 s 3 10 a (8 a) |
| VIII of 18?9 (Petroleum) as modified up to ? January 1909 | 7 a |
| XIII of 18?? (Glanders and Farcy) as modified up to 1st February 1908 | 2 a 6 |

| | | |
|---|---|---|
| Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February, 1908 ... ... ... | | ... In Nagri 9 p. (1 a.) |
| Act I of 1906 [Indian Tariff (Amendment).] ... ... | | ... In Urdu. 3 p (1 a) |
| Ditto | ditto | .. In Nagri, 3 p (1 a) |
| Act III of 1906 (Coinage) ... ... ... | | ... In Urdu 9 p. (1 a) |
| Ditto | ditto ... | .. In Nagri 9 p (1 a) |
| Act V of 1906 (Stamp Amendment) ... ... ... | | ... In Urdu 3 p (1 a) |
| Ditto | ditto ... | ... In Nagri 3 p (1 a) |
| Act III of 1907 (Provincial Insolvency) ... ... | | ... In Urdu. 1 a 6 p (1 a) |
| Ditto | ditto ... | ... In Nagri. 1 a 6 p (1 a) |
| Act IV of 1907 [Repealing and Amending (Rates and Cesses)] | | ... In Urdu 3 p (1 a) |
| Ditto | ditto ... | ... In Nagri. 3 p (1 a) |
| Act V of 1907 (Local Authorities Loan) ... ... | | ... In Urdu. 3 p (1 a) |
| Ditto | ditto ... | ... In Nagri 3 p (1 a) |
| Act VI of 1907 (Prevention of Seditious Meetings). ... | | ... In Urdu. 3 p (1 a) |
| Ditto | ditto ... | ... In Nagri. 3 p. (1 a) |
| Act I of 1908 (Legal Practitioners) ... ... ... | | ... In Urdu. 3 p. (1 a) |
| Ditto | ditto ... | ... In Nagri 3 p. (1 a) |
| Act II of 1908 (Tariff) ... ... ... ... | | ... In Urdu. 3 p. (1 a) |
| Ditto | ditto .. | ... In Nagri 3 p (1 a) |
| Act V of 1908 (Code of Civil Procedure) ... ... | | ... In Urdu. Re. 1 2 a (6 a) |
| Ditto | ditto ... | ... In Nagri Re 1 2 a (6 a) |
| Act VI of 1908 (Explosive Substances) ... ... | | ... In Urdu. 3 p (1 a) |
| Ditto | ditto ... | ... In Nagri. 3 p (1 a.) |
| Act VII of 1908 (Incitements to offences) ... ... | | ... In Urdu. 3 p (1 a) |
| Ditto | ditto ... | ... In Nagri 3 p (1 a) |
| Act IX of 1908 (Limitation) ... ... ... | | ... In Urdu 2 a (1 a) |
| Ditto | ditto ... | ... In Nagri 2 a. (1 a) |
| Act X of 1908 (Salt Duties) ... ... ... | | ... In Urdu 3 p. (1 a) |
| Ditto | ditto ... | ... In Nagri 3 p. (1 a) |
| Act XI of 1908 (Assam Labour and Emigration) ... | | ... In Urdu. 3 p (1 a) |
| Ditto | ditto ... | ... In Nagri. 3 p (2 a) |

## V.—MISCELLANEOUS PUBLICATIONS

| | | | |
|---|---|---|---|
| Table showing Effect of Legislation in the Governor General's Council during 1906 ... ... ... | | ... | 3 a 6 p (1 a.) |
| Ditto | ditto | during 1907 | 2 a. 6 p (1 a.) |
| Ditto | ditto | during 1908 | 4 a (1 a.) |

Annual Indexes to the Acts of the Governor General of India in Council for 1906 and 1907 The price is noted on them.

Proceedings of the Council of the Governor General of India for making laws and Regulations from 1906 to date Super-royal 4to Annual subscription Rs 5 (Re 1); single issue 4a, including postage

Addenda and Corrigenda List No I of 1906 to the List of General Rules and Orders ... ... ... ... ... 3 p. (1 a)

| | | | |
|---|---|---|---|
| Ditto | ditto | No II of 1906 | .. 1 a 9 p. (1 a) |
| Ditto | ditto | No. I of 1907. | ... 3 p (1 a.) |
| Ditto | ditto | No II of 1907 | .. 1 a. (1 a) |
| Ditto | ditto | No I of 1908 | ... 1 a 6 p. (1 a) |
| Ditto | ditto | No II of 1908 | .. 2 a 9 p (1 a). |

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India, 1901-03, with an Index of cases, compiled under the orders of the Government of India, by F. G. Wigley, of the Inner Temple, Bar-at-Law, Edition 1905. Rs 10 Reduced to Rs 5 per copy .. ... ... (10 a)

| | |
|---|---|
| f 1890 (Charitable Endowments) as modified up to 1st August, | |
| .. | In Urdu 6 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| of 1896 (Excise) as modified up to 1st March, 1907 | In Urdu 2 a 9 p (2 a) |
| Ditto ditto | In Nagri 3 a 3 p (2 a) |
| of 18 9 (Glanders and Farcy) as modified up to 1st February, | |
| .. .. | In Urdu 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| 1906 [Indian Tariff (Amendment)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| of 1906 (Coinage) | In Urdu 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| 1906 (Stamp Amendment) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| of 190 (Provincial Insolvency) | In Urdu 1 a 6 p (1 a) |
| Ditto | In Nagri 1 a 6 p (1 a) |
| of 1907 [Repealing and Amending (Rates and Cesses)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| f 1907 (Local Authorities Loan) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| of 190 (Prevention of Seditious Meetings) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| f 1908 (Legal Practitioners) .. | In Urdu 3 p (1 a) |
| Ditto ditto .. | In Nagri 3 p (1 a) |
| of 1908 (Tariff) | In Urdu 3 p (1 a) |
| Ditto | In Nagri 3 p (1 a) |
| of 1908 [Indian Tariff Amendment] | In Urdu 3 p (1 a) |
| of 1908 (Code of Civil Procedure) | In Urdu Rs 1 2 (6 a) |
| Ditto ditto | In Nagri Rs 1 2 (6 a) |
| of 1908 (Explosives Substances) .. .. | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| I of 1908 (Incitements to Offences) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| of 1908 (Limitation) | In Urdu 2 a (1 a) |
| Ditto ditto | In Nagri 2 a (1 a) |
| of 1908 (Salt Duties) | In Urdu 3 p (1 a) |
| Ditto | In Nagri 3 p (1 a) |
| of 1908 (Assam Labour and Emigration) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (2 a) |
| V of 1908 [Indian Criminal Law (Amendment)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| I of 1908 (Indian Registration) | In Urdu 2 a (2 a) |
| Ditto ditto | In Nagri 2 a (2 a) |
| II of 1908 (Indian Emigration) .. | In Urdu 2 a 3 p (2 a) |
| Ditto ditto | In Nagri 2 a 3 p (2 a) |
| of 1909 (Indian Steamship Law Amendment)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| of 1909 (Whipping) | In Urdu 3 p (1 a) |
| Ditto | In Nagri 3 p (1 a) |
| of 1909 [Amending (Army Act)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| I of 1909 (Anand Marriage) .. | In Urdu 3 p (1 a) |
| Ditto ditto | |

## TABLE OF CASES REPORTED

# TABLE OF CASES CITED

# INDEX.

PAGE

order of remand, under section 562 aforesaid, would be, this Court was careful to point out that anything done in pursuance of such an order would become *ipso facto* of no effect on the reversal of the said order, because the court concerned would have no jurisdiction to pass any further order in the case (except by way of review), unless empowered to do so by the order under section 562 itself. No such consideration arises in the case now before us, as it is clear that the learned Munsif after passing his preliminary decree had jurisdiction, and indeed was bound to proceed in due course to pass a final decree in the case It seems to us that a serious anomaly would be created by the modification of the preliminary decree of June 25th, 1908, while the final decree of June 30th, 1908, remained in force and had not been appealed against. There is direct authority on the point in the case of *Mackenzie* v *Narsingh Sahai* (1), which decision is in favour of the contention raised before us by the appellant We follow this ruling, and set aside accordingly the order and decree of the lower appellate court and restore that of the court of first instance The plaintiff appellant will get his costs from the defendant respondent in this and the lower appellate court

*Appeal decreed.*

## PRIVY COUNCIL

UDAI RAJ SINGH AND OTHERS (PLAINTIFFS) *v* BHAGWAN BAKHSH SINGH AND ANOTHER (DEFENDANTS)

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow]

*Transfer of immoveable property in Oudh—Oral gift* inter vivos—*Act No I of 1869 (Oudh Estates Act) sections 13 16 and 17—Act No IV of 1882 (Transfer of Property Act) section 123—Deed construction of—whether testamentary or deed of gift* inter vivos—*Legatee predeceasing testator*

Under the Oudh Estates Act (I of 1869) immovable property is not transferable by gift *inter vivos* otherwise than by registered deed

Although an adopted son is exempt from the operation of section 13 as being one of the special class therein designated a gift to him to be valid must comply with the provisions of sections 16 and 17 of the Act the two sets of sections not being contradictory of each other

By a deed dated the 5th May 1887 executed by a taluqdar in favour of his adopted son the predecessor in title of the appellant the executant (after

*Present* :—Lord MACNAGHTEN, Lord COLLINS Sir ARTHUR WILSON and Mr AMEER ALI

(1) (1909) I L R 36 Calc, 762

having mutation of names made in his favour. On 5th May, 1887, he executed a document by which, according to the contention of the appellants, he effected a complete transfer of the taluqa to Lachhman Singh who remained in proprietary possession of it until his death. Of that document the following were the provisions material to this appeal:—

After stating that he had by a "deed of will" written and registered on 26th May, 1883, appointed under certain conditions his adopted son Lachhman Singh as his successor to the whole of his property, and that it had become necessary to alter some of the provisions of that deed, and after declaring that "Lal Lachhman Singh, my adopted son under section 22, clause 5, of Act I of 1869 is and will be my permanent successor," and making provisions for the expenses of the temples and places of worship and other expenses incidental to the management of the estate, the document provided by paragraphs 6, 7 and 8 as follows:—

Sixthly. the instrument dated the 1st June 1878 which I had executed in the interests of management (*intizaman*) and expediency (*maslahatan*) in favour of Babu Sarabjit Singh taluqdar of Tikari in whose favour *dakhil kharij* was also made. I have had it (the said instrument)—after taking it back with our mutual consent from the said Babu Sahib—annulled, destroyed and cancelled and the said Babu Sahib after absolutely relinquishing that (*us*) right and after revocation of the gift again put me in possession of the property mentioned in the said instrument. and the said Babu Sahib after getting his name expunged from the Revenue Registers had published the fact of the relinquishment by him and (moreover) executed and registered a deed of agreement dated the 29th May 1883 on a fully stamped paper and after getting possession I made over (*hawala kiya*) the whole of the said property to my adopted son and permanent successor *barkhurdar* Lal Lachhman Singh in virtue of being my representative (*kaim muqam khud*) and I delivered possession to him and caused my own name to be removed from the Government Office and that of the said *barkhurdar* to be formally substituted. and as against the said *barkhurdar* I have absolutely and unconditionally relinquished all rights (*haquq*) and proprietorship (*milkiyat*) as well as ceased interference (*madakhilat*) with the property (*jaedad*). Therefore neither Sarabjit Singh himself nor his representatives have any right left to make a claim under the deed of 1st June 1878.

Seventhly, in virtue of this deed *barkhurdar* Lal Lachhman Singh as an adopted son who is to be regarded (*mutsawwar*) as a natural son with respect to all rights and privileges (*ikhtiarat*)—has become, and will continue to be (*honge lit* will become) like myself in place of me my full and permanent successor (*jae nashin*) and it will be his duty (*farz hoga*) like my natural son, to exercise forethought in the management of all my property and to take (*len*) all my movable and immovable property and to give an allowance of Rs. 2,000 a year, as mentioned below, to my Rani during her life time and to have regard

# PRIVY COUNCIL.

GANPAT RAO (DEFENDANT) *v* ANANT RAO (PLAINTIFF)
[On appeal from the High Court at Allahabad]

*Act No XXIII of 1871 (Pensions Act) section 6—Certificate giving court jurisdiction to try suit—Sanad, construction of—Grant of soil of village not a grant of Land Revenue—Non-production of certificate at time of institution of suit—Grant on payment of quit rent.*

A village, portion of the subject of a suit for partition, was granted to the ancestor of the parties by Maharaja Scindia of Gwalior in 1861, and the grant was confirmed in 1866 by the British Government in a sanad which declared that the village in question "shall be continued to the grantee and his heirs inclusive of all lands, allowances and rights belonging to others so long as he and his heirs shall continue loyal to the British Government, and shall pay Rs 600 to Government as a quit rent" In a later portion of the sanad there was a guarantee against any further payment by the holder "on account of Imperial Land Revenue beyond the amount specified" and a declaration that the village and its holder "shall be liable for any local taxation which may be imposed on the district generally"

*Held* (affirming the decision of the High Court) that the sanad was not a grant of Land Revenue, but of the soil of the village itself and therefore the Pensions Act (XXIII of 1871) did not apply but, even if it did, the Subordinate Judge had rightly held that an order made by the Revenue Court referring the plaintiff (respondent) to a suit in the Civil Court was equivalent to a certificate under section 6

*Semble*—The non production of a certificate under section 6 of the Pensions Act at the time of the institution of a suit for which such a certificate is necessary is not a bar to the maintenance of the suit but is a defect which may be cured by obtaining the certificate at a later stage of the proceedings

APPEAL from a judgment and decree (10th July 1905) of the High Court at Allahabad, which varied a decree (30th June 1902) of the Subordinate Judge of Jhansi.

The suit out of which this appeal arose was brought by the present respondent against his nephew, the present appellant, for partition of certain villages, houses and lands

The facts of the case are sufficiently stated in the report of it before the High Court (SIR JOHN STANLEY, C J, and BANERJI, J) which will be found in I L R, 28 All, 104.

On this appeal

*DeGruyther, K C*, and *Peary Chand Dutt* for the appellant contended that the Court had no jurisdiction to try the suit because no certificate under the Pensions Act (XXIII of 1871) was

*Present* —LORD MACNAGHTEN, LORD COLLINS and SIR ARTHUR WILSON.

death of Rani Ajit Kunwar the defendant has been in wrongful possession of the property in dispute and prayed for a decree for proprietary possession of the same

The only grounds of defence now material were the subjects of the 3rd and 4th of the 19 issues settled for trial, namely, "(3)(a) Did Raja Madho Singh abdicate his entire property in favour of Lachhman Singh, and put him in proprietary possession of the same? If so did the above acts constitute a valid transfer? (b) Did Lachhman Singh enjoy proprietary possession over the property from 1886 until his death in April 1891? (c) If the acts of Raja Madho Singh be held to amount to a valid transfer, was not that transfer absolute and heritable? (4) Did Raja Madho Singh execute the deed of 5th May, 1887, and does that deed constitute a valid transfer in favour of Lachhman Singh?"

The Subordinate Judge held that Raja Madho Singh during his lifetime did as a matter of fact transfer his property to Lachhman Singh who continued in possession until his death in April, 1891, but that the transfer was invalid in law and inoperative to convey title to Lachhman Singh having regard to sections 16 and 17 of Act I of 1869 and section 123 of Act IV of 1882, as it had not been made by an instrument in writing

With regard to the deed of the 5th of May, 1887, the Subordinate Judge held that it had not been duly stamped and was therefore not admissible in evidence as a valid transfer to Lachhman Singh It was consequently, he decided, unnecessary to consider whether on its construction it was a deed of transfer as was contended by the plaintiff or only a deed of adoption and will as was contended on behalf of the defendant, but expressed his opinion that the point was not free from doubt and difficulty" with regard to paragraphs 6 and 7 of the deed In the result he dismissed the suit with costs

From that decision the plaintiffs appealed to the Court of the Judicial Commissioner (Mr T Chamier, First Additional Judicial Commissioner, and Mr L G Evans Second Additional Judicial Commissioner) who dismissed the appeal on the grounds (1) that under Act I of 1869, a registered document was necessary to effect a valid transfer of the property to Lachhman Singh, and (2) that the deed of 5th May 1887 was not a deed of gift,

to the conditions of loyalty and the payment of an annual sum The appellant, Sardar Ganpat Rao is the eldest son of Sultanji Rao, deceased, who was the eldest son of Jagdeo Rao The respondent, Anand Rao, is the third surviving son of Jagdeo Rao His second son, Tantya, was adopted into another family before the death of Jagdeo Rao This litigation began through a claim put forward by Anand Rao for a partition of all the family property Ultimately, the present suit, which was brought by Anand Rao, as plaintiff, against his nephew, Sardar Ganpat Rao, for partition, came before the Subordinate Judge of Jhansi Numerous issues were stated and disposed of by the learned Judge, but that which was most discussed in respect of each portion of property embraced in the claim was that which raised the question whether the want of a certificate under section 6 of the Pensions Act XXIII of 1871 was a bar to the action in respect of each of the portions of land in which rights were claimed The learned Judge made a list of each of the parcels and dealt with them separately He held that the want of the certificate was a bar as to all but a few of the parcels, viz, (a) three Jhansi villages, as to which he held that a certain order made by the Collector of Jhansi of 26th October, 1899, was equivalent to a certificate under section 6, and (b) certain portions of land in the village of Mahur, as to which he held that the property in the soil itself, not the mere right to a revenue therefrom, was the subject matter of the claim, and therefore did not fall within section 6 of the Act, but as to all the rest of the parcels, including the village of Warur Buzurg and the lands therein, he held that section 6 applied and dismissed the claim

The defendant thereupon appealed to the High Court and the plaintiff filed an objection under section 561 of the Code of Civil Procedure, claiming in effect that he was entitled to have his whole claim decreed But by the time the appeal came to be heard the field of controversy was considerably narrowed. The Court at the outset of their judgment say — "Only two matters have been pressed before us in appeal by the learned counsel for the appellant They are in respect of the three villages in the Jhansi District, and a portion of the 440 acres of land in the Poona District, in respect of which the claim for partition was

intended that a Taluqdar could make an oral gift of his estate and even if such an oral gift were permissible, the provisions of section 123, Transfer of Property Act, bar the way, as there is nothing in the Act contrary to the provisions of this section."

On the second point, after reading the translation of the deed of the 5th May, 1887, MR. CHAMIER said.—

"Counsel for the defendant say that the words 'I have absolutely and unconditionally relinquished all rights' in the sixth clause should be 'I absolutely and unconditionally relinquished all rights', and they contend that this passage refers to what occurred in 1886 The plaintiffs' counsel on the other hand say that it refers to the time of the execution of the deed and that it means 'I have by this deed absolutely and unconditionally relinquished all my rights'

"The first thing to notice about this document is that the executant does not call it a deed of gift, but a deed of adoption and a codicil to a will In this respect the difference between this deed and the deed of 1st June 1878, referred to in the 6th clause is very striking The word *hiba*, which is the word usually employed to denote a gift, does not appear at all in the deed now in question The word *jainashin* which occurs in several places in the deed, means literally 'sitting in the place of' It is used in a purely testamentary document with reference to a devisee or representative, but it may also be used with reference to a donee in a deed of gift operating *inter vivos* For example, in the preamble the Raja says that he appointed Lachhman Singh his *jainashin* by the deed of 1883 a deed which was certainly not intended to transfer any immediate title to Lachhman Singh In my opinion the use of the word *jainashin* is not conclusive either way The exact sense of the words *maratib jainashini* in the first clause was the subject of some discussion but ultimately both parties accepted the translation given above The word *maratib* means literally 'steps' It appears to me that the Raja is here referring to the transfer of possession or to the mutation of names effected in 1886 or to both The plaintiffs rely principally upon the 6th 7th and 8th clauses of the deed The conflict between the parties as to the meaning of the penultimate sentence of this clause has already been noticed

"In my opinion the construction and translation advocated by the defendant are correct The whole clause with the exception of the last sentence appears to me to be a recital of what occurred long before the deed and the disputed passage seems to refer to the action taken by the Raja in 1886 It was said that the words absolutely and unconditionally were inapplicable to the terms of the Raja's application for mutation of names (Exhibit A 25) because at the end of the application the Raja said that, if the connection of Lachhman Singh with the estate should be severed, the estate should revert to the Raja, and this was, as the Court below held a condition But the provision referred to can scarcely be described as a condition The disputed passage in the deed does not, in my opinion mean 'I have hereby relinquished,' or 'I hereby relinquish' all my rights In the first place when the executant wishes to say that a certain result should follow from the deed he uses the familiar words 'by means of this document' (*bazariye is dastawez ke*) (*vide* the 2nd and 8th clauses) Next, the 6th clause of the deed can only refer to property affected by the deed

dispensing with the certificate The learned Judges go on to point out that counsel for the respondent had abandoned his point as to the property in Mahur contained in the five deeds of sale They also treated the houses in Mahur and the Poona District as covered by the reasons given in regard to the remainder of the 440 acres included in the decree and partitioned

Their Lordships see no reason to differ from these conclusions The result is that in Their Lordships' opinion the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly

*Appeal dismissed*

Solicitors for the appellant —*T. L Wilson & Co*

Solicitors for the respondent —*Pyke Parrott & Co*

J V W

3 ## REVISIONAL CRIMINAL

*Before Mr Justice Tudball*

EMPEROR *v* BALDEO SINGH *

*Act No XI of* 1878 (*Indian Arms Act*) *section* 4—*Definition—Ammunition—Empty cartridge cases*

*Held* that Indian empty cartridge cases are ammunition within the meaning of section 4 of the Indian Arms Act, 1878 *King Emperor* v *Ibrahim* (1) followed

IN this case one Baldeo Singh was convicted by a Magistrate and fined Rs 5, under section 19 (*f*) of the Arms Act, 1878, for being in possession of certain empty cartridge cases which had already been used for firing Against his conviction and sentence Baldeo Singh applied in revision to the Sessions Judge, who referred the case to the High Court under section 438 of the Code of Criminal Procedure, being of opinion that the empty cartridge cases were not ammunition within the meaning of the Acts

Mr *A E Ryves* (Government Advocate), for the Crown

The applicant was not represented

TUDBALL J —One Baldeo Singh has been convicted under section 19 (*f*) of the Arms Act and sentenced to pay a fine of

* Criminal Reference No 664 of 1909

(1) (1905) 7 Bom., L. R., 474

Sarabjit Singh in 1878 This is revoked, and it therefore is perfectly clear that the executant never intended to make an irrevocable gift of the estate or any portion thereof to Sarabjit Singh. The deed of 1887 *purports to put Lachhman* Singh in place of Sarabjit Singh and the sixth clause contains a recital that Sarabjit Singh and his representatives have no right left in the property, but it does not contain any recital that the executant has no right left in the property

"It is necessary also to refer to the petition of the executant dated 17th March, 1886 (Exhibit A 25), under which mutation of names was effected in favour of Lal Lachhman Singh, which recites that Lachhman Singh has been placed in proprietary possession of the estate comprising 291 *had bast* villages, and prays that his name be entered in the papers It provides also for the management and supervision of the applicant so long as Lal Lachhman Singh is under 21 years of age, and further that if in any event Lal Lachhman's connection with the estate be severed during the lifetime of applicant (*e g*, in case of his death or his becoming hostile to the applicant) the whole estate would revert to the applicant just as if no adoption or mutation of names had ever taken place. It is therefore as clear as can be that prior to 1887 the executant had no idea of granting to Lachhman Singh a perfect and indefeasible title to the estate, and this is an important matter when the deed of 1887 has to be interpreted.

"It is contended for the respondent Raja No 1 that the fact that the deed of 1887 was revocable in the event of a son being born to the executant, and that no provision of any kind was made for the executant's expenses after 1887, shows that the executant never intended at that time to part with his proprietary title and, if any words in the deed are repugnant to the clear intention to the executant as expressed in other portions of the deed, they must be disregarded according to the usual rules for construction of documents

"It is contended that the only operative clauses are the 7th and 8th, the rest being mere recitals, the word 'donee' in the 8th clause simply meaning a donee under the conditions of the deed and not a donee in the sense that the donee was to be invested with a perfect proprietary title to the estate.

"It appears to me that if the executant had wished to execute a deed of gift, pure and simple, he could have had no difficulty in having a simple deed drafted accordingly He did not do this but had an ambiguous and cumbersome deed drawn out, by which he hoped to perfect the title of Lal Lachhman Singh which should come into effect on the executant's death This object was to be effected by placing Lachhman Singh in nominal possession and effecting mutation of names in his favour thereby preventing any claim by a possible heir out of possession The present dispute has arisen as Lachhman Singh predeceased the executant

"The conclusion I have arrived at after consideration of all the arguments addressed to the Court is that the executant did not intend to divest himself of his title to the estate, but only to place Lachhman Singh in a position which would be impregnable on the death of executant during the lifetime of Lachhman Singh I hold that this instrument cannot be construed to be a deed of gift as defined in section 122, Act IV of 1882"

On this appeal—

mention at the outset that the terms of the reference are by no means so clear as they ought to be. It appears that Musammat Ram Piyari was convicted under section 325 of the Indian Penal Code and sentenced to one month's simple imprisonment. The matter came before the Additional Sessions Judge, possibly on an application for revision The learned Additional Sessions Judge does not make this clear, but the parties were apparently willing to compromise. Section 345, sub section (2) of the Code of Criminal Procedure, provides that the offences of causing hurt and grievous hurt under the sections therein mentioned may, with the permission of the Court before which the prosecution is pending, be compounded by the person on whom the hurt was inflicted. This sub section cannot apply, because there was no suggestion of a composition before the court which tried Musammat Ram Piyari. Sub-section (5) provides that when an accused is being committed for trial, or when there has been a conviction and an appeal is pending no composition for the offence should be allowed without leave of the court to which he is committed, or, as the case may be, before which the appeal is to be heard This sub-section cannot apply, because the conviction had taken place and there was no appeal pending, nor could there have been any appeal from the sentence. It seems to be very doubtful whether the High Court in exercise of its powers of revision has any jurisdiction to allow a composition. I direct that the case be laid before a Bench of two Judges for determination of the question."

Mr. *A. E. Ryves* (Government Advocate), for the Crown.

The applicant was not represented.

KNOX and KARAMAT HUSAIN, JJ.—After hearing the learned Government Advocate, we have come to the conclusion that the powers conferred upon the Court in revision are wide enough to allow us to give leave, if we see fit, for the composition of an offence under section 325, Indian Penal Code. Section 423 of the Code is expressly mentioned in section 439, and all or any of the powers conferred on a court of appeal by section 423 are powers which this Court can exercise in revision. Section 423, clause *(d)*, empowers an appellate court to make any amendment or any consequential or incidental order that may be just or proper. This Court in revision can therefore do the same. The leave that we give in a case of this kind would be an incidental order, and we think this case a proper one in which to give such leave. A very similar question was involved in the case of *Abadi Begam* v. *Ali Husen* (1). When this last named case was decided, this Court sitting as a Court in Revision considered itself empowered to pass an order under section 517 of the Criminal Procedure Code, although at that time clause *(d)* of

(1) Weekly Notes, 1897, p. 25.

There was nothing contradictory in section 13 and sections 16 and 17 of *Act I of 1869*, and the fact that an adopted son was exempt from the provisions of section 13 did not prevent the operation of the subsequent sections or render a gift to him valid if there had been no compliance with their provisions. In *Hur purshad* v. *Sheo Dayal* (1) a transfer, though not formally attested or registered, was held to be valid because it was made prior to the passing of Act I of 1869 and that Act had no retrospective effect. Since Act I of 1869 such a transfer would not be held valid; section 123 of Act IV of 1882 was referred to.

It was also contended that the Court of the Judicial Commissioner had rightly decided that the deed dated 5th May 1887 did not operate as a gift *inter vivos*, but was of a testamentary nature. The Raja called it a deed of adoption and a codicil to a will, and a consideration of the language he used showed that he had no real intention of divesting himself *in præsenti* of the property in favour of Lachhman Singh and that several provisions indicated a course of conduct to Lachhman Singh with respect to the property which could only be followed in the future. Had it been meant a a gift *inter vivos* there would have been no difficulty in expressing his intention quite clearly. The deed itself was marked by the Registration authorities under Register No. 3 whereas had it been a transfer it would have been marked under Register No. 2. Reference was made to *Fanindra Deb Raikat* v. *Rajeswar Das* (2), *Ishri Singh* v. *Baldeo Singh* (3), Registration Act (III of 1877) Act I of 1869 section 22 clauses 4 and 5, and *Bhai Narindar Bahadur Singh* v. *Achal Ram* (4).

*Sir R. Finlay, K.C.*, replied:—

1910, *February 10th*.—The judgement of their Lordships was delivered by LORD MACNAGHTEN:—

This is an appeal from the Court of the Judicial Commissioner of Oudh affirming a decree of the Subordinate Judge of Lucknow.

The matter in controversy is the right of succession to the Amethi taluqa in the Sultanpur district of the Province of

(1) (1876) L. R. 3 I. A. 259 (277).

(2) (1885) I. L. R. 11 Calc. 463: L. R. 12 I. A. 72.

(3) (1884) I. L. R. 10 Calc. 792: L. R. 11 I. A. 135.

(4) (1893) I. L. R. 20 Cal. 649: L. R. 20 I. A. 77.

circumstances of the present case, inasmuch as that was a case relating to *stridhan* property and to the succession of a grand-daughter, and not to the case of a mother. Neither does the ruling in *Narain Das* v. *Tirlok Tiwari* (1) apply to the present case. In that case the question was whether the husband could succeed to the property of an unchaste wife, who had become prostitute. There is no express authority of the Allahaba High Court against me. There are, however, two decisions the Madras High Court against me:—*Kojiyadu* v. *Lakshn* (2) and *Vedammal* v. *Vedanayaga Mudaliar* (3). I rely upc both texts and rulings. There are no express texts relating the case of a mother, but there are texts for the case of a wido and I submit that the same rule that applies to a widow wou apply to a mother. The text relating to the case of a widow is be found in Mitakshara, chapter II, section I, CXXXVI, Note I rely on a text of Narada to show that she who is addicte to vice cannot inherit. *Mitakshara*, chapter II, section XCCX, Notes 3 and 8. The mother who has become unchaste fal within the category of persons "addicted to vice." *Ramna Tolapattro* v. *Durga Sundari Debi* (4) and *Moniram Koli* v. *Keri Kolitani* (5) were also referred to.

Mr. *B. E. O'Conor* (for the respondent) was not called upoı

KNOX and KARAMAT HUSAIN, JJ.—The sole plea set fort in the memorandum of appeal is that the respondent, who is Hindu widow and who had become unchaste during her hu band's lifetime, is not entitled to succeed as mother to th estate of her son The plea as set out is apparently an error, fo according to the judgment of the lower appellate court, the alleg ed unchastity of the respondent took place, not during he husband's lifetime, but after his death, and the plea, if it is t have any force, should run thus, *viz.* that the respondent, bein unchaste, is not entitled to succeed to her son's estate Mr. *Go vind Prasad*, who appears for the appellant, has been at consider able pains to look up the authorities and to lay them before u but beyond an observation of Narada, in which that author pu an interpretation upon the words "प्रचिकित्स्यरोगाद्या" containe

(1) (1906) I. L. R., 29 All., 4. (3) (1907) I. L. R., 31 Mad., 100.
(2) (1882) I. L. R., 5 Mad., 149 (4) (1878) I. L. R., 4 Calc., 550.
(5) (1880) I. L. R., 5 Calc., 776, at page 787.

There was nothing contradictory in section 13 and sections 16 and 17 of Act I of 1869, and the fact that an adopted son was exempt from the provisions of section 13 did not prevent the operation of the subsequent sections or render a gift to him valid if there had been no compliance with their provisions In *Hurpurshad v. Sheo Dayal* (1) a transfer, though not formally attested or registered, was held to be valid because it was made prior to the passing of Act I of 1869 and that Act had no retrospective effect Since Act I of 1869 such a transfer would not be held valid, section 123 of Act IV of 1882 was referred to

It was also contended that the Court of the Judicial Commissioner had rightly decided that the deed dated 5th May 1887 did not operate as a gift *inter vivos*, but was of a testamentary nature The Raja called it a deed of adoption and a codicil to a will, and a consideration of the language he used showed that he had no real intention of divesting himself *in præsenti* of the property in favour of Lachhman Singh and that several provisions indicated a course of conduct to Lachhman Singh with respect to the property which could only be followed in the future Had it been meant as a gift *inter vivos* there would have been no difficulty in expressing his intention quite clearly The deed itself was marked by the Registration authorities under Register No 3, whereas had it been a transfer it would have been marked under Register No 2 Reference was made to *Fanindra Deb Raikat v. Rajeswar Das* (2), *Ishri Singh v Baldeo Singh* (3), Registration Act (III of 1877) Act I of 1869, section 22, clauses 4 and 5, and *Bhai Narindar Bahadur Singh v Achal Ram* (4)

*Sir R Finlay K C* replied —

*1910, February 10th* —The judgement of their Lordships was delivered by LORD MACNAGHTEN —

This is an appeal from the Court of the Judicial Commissioner of Oudh affirming a decree of the Subordinate Judge of Lucknow

The matter in controversy is the right of succession to the Amethi taluqa in the Sultanpur district of the Province of

(1) (1876) L R. 3 I A 259 (277)
(2) (1885) I L R 11 Cal 463 L R. 12 I A 72
(3) (1884) I L R 10 Calc 792 L R 11 I A 135
(4) (1893) I L R 20 Cal 649 L R., 20 I A 77

which we are dealing, and in the commentary on that sloka (see याज्ञवल्क्यः २ अ।१४०-१४२।) The learned vakil for the appellant did not take his stand upon the word out caste (पतितः) for obvious reasons see Act No XXI of 1850 He maintains that the respondent is included in the word "औपपातिक" which Sir William Colebrooke translates, somewhat unhappily, as "addicted to vice," for उपपातः is a sin of a lesser degree, which is possible of expiation, and hardly "vice" as the word is commonly understood The text of Narada thus quoted is to be found in नारद २३ अ। २१ । and is a commentary of Narada on the institutes of Manu, book IX, sloka 201, and this being so it is well to look first at the text of Manu Sloka 201 is thus translated by G Buhler (Sacred Books of the East, Vol XXV, page 372)—'Eunuchs, and out castes, (persons) born blind or deaf, the insane, idiots and the dumb, as well as those deficient in any organ (of action or sensation) receive no share" Here there is no allusion to the "Upapatikas" or persons addicted to the lesser vices, and Narada in adding the word is evidently expanding the words of the "Holy Manu" Unfortunately it is open to considerable doubt whether the word "उपपातिकः is the exact word for which the sage Narada is responsible As Mr Jogendra Chander Ghose points out in his valuable treatise on the "Principles of Hindu Law" page 230, there are three different readings extant of this particular text The Kalpataru, the Ratnakara, and the Parijata read अपपात्रितः and Saraswati Vilasa reads अवपातिक For औपपातिक the Dayabhaga really is *responsible* Unfortunately we have not in this library a copy of Narada's text as it stands in the original The various readings in the order in which I have given them mean (*a*) a person guilty of a heinous crime—the killing of a Brahman or of a King are illustrations given of *the word by learned commentators*, (*b*) *Persons* guilty of grave slips in conduct, (*c*) Persons addicted to the minor vices The margin given by these readings is very wide, too wide indeed, but enough has been said to show how unsafe it would be to hold that an unchaste woman falls under any, and if so under which of them It must throughout be remembered that we have not in this case to deal with the instance of a woman

The point is too clear for argument Section 16 of the Act of 1869 enacts that no transfer—a term which is defined in the Act as "an alienation *inter vivos*"—made by a Taluqdar, shall be valid unless made by an instrument in writing and attested by two or more witnesses Section 17 requires, as a condition of the validity of a deed of gift, registration within one month from the date of the execution of the instrument It was suggested in the course of the argument that this provision does not apply to a gift to a person in the position of an adopted son, because section 13 which is to be found in the preceding chapter of the Act headed 'Powers of Taluqdars and Grantees to transfer and bequeath,' enacts that no Taluqdar shall have power to give his estate to a person not being a member of a designated class (which includes an adopted son), except by an instrument executed not less than three months before the death of the donor and attested and registered as therein mentioned It is difficult to discover any contradiction in these sections or to understand how it can be argued that a gift in contravention of section 16 may be valid in case the object of the gift is exempt from the operation of section 13, and the gift therefore is not subject to the additional fetter imposed by that section

The question as to the meaning and effect of the deed of the 5th of May, 1887, is rather more difficult

The circumstances which led up to the execution of that instrument are as follows —

On the 1st of June, 1878, by a registered deed of that date, Madho Singh made over the Amethi taluqa, with the exception of certain muafi villages and certain villages dedicated to the endowment of a temple at Benares, to one Sarabjit Singh, subject to certain conditions and provisions

On the 26th of May, 1883, Madho Singh executed a will stating that he had adopted Lachhman Singh and giving him the entire taluqa, but making provision for the event of his leaving a natural born son

On the 29th of May, 1883, Sarabjit Singh executed a registered deed stating that he had relinquished the property and all proprietary rights acquired by him under the deed of gift of the 1st of June, 1878, in favour of Madho Singh and declaring

There is thus no authority for the contention that a widow who after her husband's death lives with another man commits an act of unchastity or vice.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

---

*Before Mr. Justice Sir George Knox and Mr. Justice Richards.*

SAID-UD-DIN KHAN AND OTHERS (DEFENDANTS) *v.* RATAN LAL (PLAINTIFF).*

*Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 134, 148—Mortgage—Redemption by one mortgagor—Nature of possession—Subsequent sale under another mortgage decree—Suit by another representative of mortgagor for redemption—Limitation*

G, in 1850, mortgaged certain property and died, leaving a son, a daughter, and a widow. The son obtained a decree for redemption of the whole, which was sold to M H, G M, and A, who redeemed the mortgage. After the passing of this decree G's son and widow mortgaged certain shares in the villages affected by the original mortgage, and in 1891 these shares were sold in execution of a decree for sale and purchased by M H and the representatives of G M and A.

*Held*, on suit by the representative of G's daughter to redeem her share, that article 148 and not article 134 of the second schedule to the Indian Limitation Act, 1908, applied and the suit was not time-barred.

THE facts of this case were as follows:—

One Ghulam Mustafa Khan executed a usufructuary mortgage-deed in respect of his share in certain villages in favour of one Mohan Lal, on the 5th of September, 1850. The heirs of Mohan Lal in their turn sub-mortgaged the property to certain other persons. Ghulam Mustafa died, leaving three heirs, Ghulam Nabi, a son, Shams ul-nissa, a widow, and Ashraf Begam, a daughter. Ghulam Nabi brought a suit for redemption and obtained a decree against the mortgagees and the sub-mortgagees on the 26th of February, 1872. The decree, however, was subsequently put up for sale in execution of a simple money-decree obtained against Ghulam Nabi and was purchased by one Meghraj Singh on the 25th May, 1875. Meghraj Singh sold it to Muhammad Husain, Ghulam Muhi-ud-din Khan, and Azim-ullah Khan These persons paid off the decretal amount under the decree and redeemed the entire mortgaged property. Prior to the redemption, however, Ghulam Nabi and Shams-ul-nissa had mortgaged the property to one Jauhari

* Appeal No. 52 of 1908 under section 10 of the Letters Patent.

lifetime, or which may come to me by inheritance or to which I may become entitled "

Madho Singh's object in putting on record the statement contained in paragraph 6 probably was to make the position of Lachhman Singh secure against the interference of certain relatives with whom, it is said, he had a blood feud, one of whom might possibly claim under Sarabjit Singh Paragraph 8 carries the matter no further In styling Lachhman Singh "donee" the document refers simply to what was given to him by the will and codicil

Looking at the matter broadly their Lordships agree with the learned Judges in the Court of the Judicial Commissioner in holding that the instrument of the 5th of May 1887, was testamentary and cannot be construed as a deed of gift *inter vivos*

Their Lordships will therefore humbly advise His Majesty that the appeal must be dismissed

The appellants will pay the costs of the appeal

*Appeal dismissed*

Solicitors for the appellants *Barrow, Rogers and Nevill.*

Solicitors for the respondents —*Ranken Ford, Ford, and Chester*

J V W.

---

IMDAD AHMAD AND OTHERS (DEFENDANTS) *v* PATESHRI PARTAP NARAIN SINGH (PLAINTIFF)

[On appeal from the High Court of Judicature at Allahabad ]

*Evidence—Reversal by appellate court of decision as to genuineness of documents—Evidence taken on commission so that first court had not the usual advantage of seeing and hearing witnesses—Suit by head of family and owner of impartible raj to recover immovable property reverting to raj on failure of objects for which it was given as maintenance*

In this appeal from the decision of the High Court in *Pateshri Partab Narain Singh* v *Rudra Narain* I. L. R., 26 All. 528 their Lordships of the Judicial Committee agreed with the view of the High Court that the plaintiff (respondent) was entitled to succeed so far as his claim was based on the *sipurdnama* which if genuine was decisive of the case and without dissenting from the opinion on the point of law as to the competency of the appellate court under the circumstances to add a party after the period of limitation

---

*Present* —Lord MACNAGHTEN Lord COLLINS Sir ARTHUR WILSON and Mr AMEER ALI.

Ashraf, who inherited her share in the property, sold it to the plaintiff, Ratan Lal. The plaintiff accordingly instituted the present suit for redemption of the share of Ashraf.

"It is contended that the claim is barred by limitation There can be no doubt that Musammat Ashraf had a share in the property mortgaged by her father Upon redemption of that mortgage the person who redeemed the mortgage took and retained possession of her share by reason of his having stepped into the shoes of the mortgagee So that his possession was equivalent to that of a mortgagee and Musammat Ashraf was entitled to redeem her share from his hands The present suit having been brought within the statutory period of limitation, namely, 60 years from the original mortgage of 1850 it is on the face of it not barred by limitation It is urged, however, that the purchasers at auction in execution of Jauhari Mal's decree took possession of Ashraf's share adversely to her As the mortgage in favour of Jauhari Mal was made by Ghulam Nabi and Shams ul nissa and not by Ashraf, that mortgage could not affect the interests of Ashraf, and the sale in execution of the decree obtained on that mortgage could not convey to the purchasers the interests of Ashraf.

"As I have said above, when Muhammad Husain and others redeemed the mortgage of 1850 in pursuance of the decree for redemption obtained by Ghulam Nabi in 1872 and took possession their possession in respect of the shares of Ashraf was equivalent to that of the original mortgagees Therefore, when they purchased the property in execution of Jauhari Mal's decree the nature of their possession as regards Ashraf's share was not changed, unless they in distinct terms or by any positive act set up a title adverse to that lady This they do not appear to have done Therefore their possession in respect of Ashraf's share being that of mortgagees was not adverse Their possession could be referred to a legal title and they must be deemed to have been in possession under that title Consequently the claim is not time barred and the courts below are in my judgment right in holding the plea of limitation to be untenable

"The appeal fails and is dismissed with costs"

Against this judgment the defendants preferred an appeal under section 10 of the Letters Patent

The Hon'ble Mr *Abdul Majid* (with him Maulvi *Muhammad Ishaq*), for the appellants, contended that the suit was barred by time, inasmuch as the defendants' possession became adverse to the plaintiff from the date of their purchase in execution of Jauhari Mal's decree on the 20th of April, 1891 Article 134 and not Article 148 of the second schedule of the Limitation Act, 1877, was applicable to the case

Babu *Surendra Nath Sen*, for the respondent, contended that the right of Ashraf Begam as mortgagor was never sold and was never purchased If the appellants purchased anything, they

as alleged;" and that the *sipurdnama* and *warasatnama* were not proved to have been duly executed. He therefore dismissed the suits.

On appeal by the defendants, the High Court (SIR JOHN STANLEY, C J, and MR JUSTICE BURKITT) said on the above points:—

"There has been, it will be observed, a great deal of litigation over the property which had devolved upon Kishan Singh, in the course of which the custom relied upon by the plaintiff was put forward as a prevailing custom in the family, but the question was never finally decided It is clear and it is admitted on all sides, that Chet Singh acquired a good title to the property now in dispute by adverse possession, and it is unnecessary therefore for us to determine whether or not that custom has been established If it existed, Chet Singh acquired the property contrary to and in spite of it and nothing occurred subsequently to reimpress it with the character of impartibility The real question therefore for determination in these appeals is whether or not the *sipurdnama* of the 21st of March, 1848, is a genuine document."

After discussing the evidence as to that document and the *warasatnama* at considerable length, the High Court continued:—

"There is to our minds undoubtedly a strong body of oral evidence in support of the genuineness of the two documents in question. We have examined with care the *sipurdnama* and find it to have all the appearance of age and genuineness An uncoloured stamp is impressed on it such as was in use many years ago, and there is nothing which we have been able to discover which raises any suspicion of forgery It was undoubtedly, we think, produced immediately after the death of Rup Kunwari by the then Raja and a claim based by him upon it * * * * After a careful inspection of the document and close attention to everything which has been said in support of the contention of the respondents, we find ourselves wholly unable to agree in the view of the learned District Judge that this document is not genuine It has, as we have said, the appearance of age, it bears an old impressed stamp, it has come from proper custody, and its genuineness is attested by several witnesses of respectability and position We are unable to reject this large body of proof and uphold the findings of the lower court The evidence establishes to our satisfaction the genuineness of the *sipurdnama* We think it unnecessary, having regard to the view expressed above, to have recourse to the presumption which sect on 90 of the Evidence Act allows a court to make in such a case

"We also see no reason for doubting the genuineness of the *warasatnama* executed by Rup Kunwari There was no object to be gained by Raja Mahesh Sitla Bakhsh Singh in fabricating this document, as Rup Kunwari had only a life estate in the property and could not dispose of it by will. She may have imagined that by reason of the death of Raja Indar Dawan Singh in her lifetime, a will by her, constituting Raja Mahesh Sitla Bakhsh Singh her heir, would be effectual. The evidence moreover satisfies us that, on the death of

*Before Sir John Stanley Knight, Chief Justice and Mr Justice Sir George Knox*

3.

RAM CHANDRA AND ANOTHER (DEFENDANTS) v GOSWAMI RAJJAN LAL (PLAINTIFF) AND OTHERS (DEFENDANTS) *

*Mortgage—Two mortgagees advancing money in equal shares—Discharge of debtor by one not binding on the other mortgagee*

One of two mortgagees who have advanced the mortgage money equally cannot give a good discharge for the entire mortgage debt without the consent of or reference to his co-mortgagee *Manzur Ali* v *Mahmud un nissa* (1) followed. *Bhup Singh* v *Zain ul Abdin* (2) and *Barber Maran* v *Ramana Goundan* (3) distinguished

THE facts of this case were as follows —

One Thakur Das executed a mortgage in respect of certain property in favour of two persons, Chandi Prasad and Brij Mohan Lal, each of whom provided half of the advance, on the 2nd July, 1898 On the 2nd of April, 1901, Thakur Das sold his equity of redemption in the mortgaged property to Chandi Prasad, one of the mortgagees The purchase money was more than sufficient to satisfy the whole of the mortgage debt Brij Mohan Lal, the other mortgagee, was no party to the sale transaction Subsequent to the purchase Chandi Prasad sold the property to Ram Chandra, the appellant, and Brij Mohan Lal sold his mortgagee rights in it to Rajjan Lal, the plaintiff Rajjan Lal brought the suit for sale of the property to recover the portion of the mortgage debt due to his assignor, Brij Mohan Lal. The main defence raised was that the mortgage was entirely satisfied by the sale made by Thakur Das to Chandi Prasad and that the plaintiff had consequently no right to maintain the suit

Dr *Tej Bahadur Sapru*, for the appellant —

The sale by Thakur Das of his interest in the mortgaged property in favour of one of the mortgagees amounted to a complete discharge of the mortgage debt It was immaterial whether Brij Mohan, the other mortgagee, was a party to the sale or not He referred to *Manzur Ali* v *Mahmud un nissa* (1) *Bhup Singh* v *Zain-ul Abdin* (2) and *Barber Maran* v *Ramana Goundan* (3) and submitted that the two latter rulings

* Second Appeal No 905 of 1908 from a decree of B J Dalal District Judge of Agra dated the 27th of May 1908 modifying a decree of Shiva Prasad Subordinate Judge of Agra dated the 19th of December, 1907.

(1) (1902) I L R 25 All., 155 (2) (1886) I. L. R 9 All. 205.
(3) (1897) I. L. R 20 Mad., 461.

transfer *Durgadut Singh* v *Rameshwar Singh* (1) The point as to the non joinder of parties was not taken by any one of the present appellants It was taken by the High Court at a late stage of the hearing of the appeals Such an objection should be taken at once, and, if not so taken, must be considered as having been waived *Phoolbas Koonwur* v *Lala Jog shur Sahoy* (2) Section 34 of the Civil Procedure Code was also referred to

*Ross* replied

1910, *February 15th* —The judgement of their Lordships was delivered by LORD COLLINS —

The question on this appeal is whether the plaintiff, who is the Raja of Basti, is entitled to recover possession of a number of villages or parts of villages situate in the district of Basti Seven connected suits brought by the same plaintiff were tried at the same time, and were all dismissed by the Judge of first instance On appeal to the High Court of Judicature for the North Western Provinces, these decisions were in all cases but two reversed and judgement entered for the plaintiff The defendants having obtained the necessary certificate now appeal to this Board in the six cases decided against them At the trial before the District Judge the oral evidence seems to have been taken on commission, and consequently the Judge of first instance had no advantage over the High Court in hearing and seeing the witnesses, and this Board must deal with the appeal under the like conditions

The case for the plaintiff was rested on two grounds—first, that the property in question was part of the raj of Basti, which, it was alleged, was an impartible raj descending to the eldest son according to the rules of strict primogeniture; and it was further alleged that on the death of the Raja and the succession of his son to the raj, a portion of the property was given to the brothers of the ruling Raja, who are called Babus, as "Haq Babuai" or maintenance, and on failure of male issue of such brothers the property so given reverts to the raj after the death of the Babus and their widow, if any Under this custom the plaintiff alleges that the property in dispute reverted to the raj on the death, in the year 1887, of the surviving widow of Babu

(1) (1909) I L R 36 Calc, 943 L R 36 I A 176

(2) (1876) I L R 1 Calc 226 (241 245) L R, 3 I A, 7 (26)

the case of *Manzur Ali* v. *Mahmud-un nissa* (1), to which one of us was a party, that he could not do so In that case it was held that, in the case of co-obligees of a money bond, in the absence of anything to the contrary, the presumption of law is that they are entitled to the debt in equal shares as tenants in common. It is contended on behalf of the appellants that the decision in this case is in conflict with two decisions. The first is the case of *Bhup Singh* v. *Zain-ul-Abdin* (2). In that case, however, it will be seen that the bond with which the judgment was concerned was described as a joint bond, and not a mortgage, as in this case, to which the mortgagees contributed their money equally. The same is to be said of the other decision in *Barber Maran* v. *Ramana Goundan* (3) In that case the money due upon a mortgage was paid to one of two mortgagees, who gave an acquittance without the knowledge of the other mortgagee, and it was held that the mortgage was discharged, and the plaintiff who brought his suit to recover his share of the mortgage debt, which had not been paid to him, was not entitled to sue. In that case too, as appears from the judgment, the money was advanced by persons who were jointly entitled to it, and not severally. The learned Judges who decided it observe in their judgment:— "The question raised by this appeal is whether a payment made to one of two persons jointly entitled under a mortgage bond can be pleaded as a valid discharge of the debt in an action brought by the other person interested in the bond." We are of opinion that the case of *Manzur Ali* v. *Mahmud-un-nissa* was rightly decided and we do not think that we ought to go behind it. We therefore dismiss the appeal with costs.

*Appeal dismissed.*

(1) (1902) I L R, 25 All, 155 (2) (1896) I. L. R, 9 All, 205
(3) (1897) I. L R, 20 Mad, 461.

RUP CHAND (PLAINTIFF) v JAMBU PRASAD (DEFENDANT)

[On appeal from the High Court of Judicature at Allahabad ]

*Hindu law—Adoption—Custom—Custom of adoption among Jains in United Provinces—Adoption of married man—Proof of custom*

*Held* (affirming the decision of the High Court) that a custom set up that among the Jains adoption is no religious ceremony and that under the law or custom there is no restriction of age or marriage among them ' was established by the evidence.

In this case the adopted son was a married man and was of the same gotra as his adoptive father

APPEAL from a decree (5th March 1908) of the High Court at Allahabad, which reversed the judgment and decree (8th November 1905) of the Subordinate Judge of Saharanpur, and dismissed the appellant's suit

The parties to the litigation were Jains, and the principal question for determination on this appeal was whether, among Jains, the adoption of a married man was valid or not In this case the adopted son, the respondent Jambu Prasad, was of the same gotra as his adoptive father

The Subordinate Judge held that the Jains were governed, in the absence of any custom to the contrary, by the Hindu law of the Mitakshara School, which did not allow the adoption of a married man, whether of the same gotra or not, and that a custom set up to the effect that such an adoption was valid was not proved

The High Court (SIR J STANLEY, C J and SIR W BURKITT, J ) reversed that decision and held that, adoption being amongst the Jains a secular, and not a religious, institution, the adoption of a married man was not illegal

The facts are sufficiently stated in the report of the hearing before the High Court, which will be found in I L R, 30 All, 197 (s. v *Asharfi Kunwar* v. *Rup Chand*), where also a pedigree is given showing the relationship of the parties to the litigation The recent case of *Manohar Lal* v *Banarsi Das* (1) which was decided by the same Judges as that now under appeal, was followed by the High Court in the present case, and in the judgement now appealed from the historical account of the Jain sect given in the earlier case is treated by the High Court as incorporated into

---

*Present* —LORD MACNAGHTEN LORD COLLINS, SIR ARTHUR WILSON and MR AMEER ALI

(1) (1907) I L. R., 29 All., 495

one account make about six shillings and eight pence sterling" (The *Hidayah* by Grady, p 44)

In the above passages the money value of a *dirham* is correctly estimated and is between three and four annas. On this basis the portion of Fatima, the Prophet's daughter, which was 500 (five hundred) *dirhams* and not 10 (ten) *dirhams*, is commonly calculated among Muhammadans to amount approximately to Rs 107 of the British coin.

The mistake in the remarks of the learned Judges in *Sughra Bibi* v *Musa Bibi* (1), is that Fatima's portion is taken to be 10 (ten) *dirhams* while as a matter of fact it was 500 (five hundred) *dirhams*

The following are a few out of the many passages to show that Fatima's portion was 500 (five hundred) *dirhams* and not 10 (ten) *dirhams* —

(*a*) Baqir said —"The Prophet did neither give his daughters in marriage nor did he marry any of his wives on a dower higher than 12 (twelve) *auqiyahs* and a *nush* "*Nush*" means one half of an *auqiyah* One *auqiyah* is 40 *dirhams* and one *nush* is twenty *dirhams*, and thus it (the dower) amounts to 500 (five hundred) *dirhams* Masalik, Book on Marriage, Vol. I, Tehran edition

قال الباقر ما زوج رسول الله سائر بناته ولا تزوج شيئا من نسائه على اكثر
من اثنتى عشرة اوقية و نش وهو نصف الاوقية و الاوقية اربعون والنش
عشرون درهما فذلك خمسمائة درهم - مسالك الافهام باب النكاح جلد اول
طبع طهران *

(*b*) According to the Shafaais and the Hanbalis it is desirable that a dower should not be less than 10 (ten) *dirhams* This view is adopted to avoid a conflict with Abu Hanifa's view It is also desirable that it should not exceed 500 (five hundred) *dirhams*, which was the amount of the dower of the daughters of the Prophet and of his wives The dower of Ommi Habiba, one of the wives of the Prophet, was no doubt 400 (four hundred) *deenars* (a gold coin), but that was fixed by Najashi as a token of distinction to the Prophet

Qustalari, a commentary on Sahih Bukhari Vol VIII, p 48 49 Nawal Kishore edition

(1) (1877) I L R 3 All 573 at 575

was valid, and that case had been followed in the present case, in which, as well as in that of *Manohar Lal* v. *Banarsi Das*, the Subordinate Judge who saw and heard the witnesses, held that the custom was not established It was then contended that the custom set up was not proved in this case. As to proof of custom reference was made to Mayne's Hindu Law, 7th edition, pages 56, 57, section 50, and the instances produced to prove the custom were referred to and commented on; and as to the admissibility of certain evidence the Evidence Act (I of 1872), section 32, clause 5, was referred to Mayne's Hindu Law, 7th edition, pages 129, 132, was also cited The adoption here was not authorized by the Hindu Law, and no legal custom had been proved authorizing a Jain widow to adopt a married man without the consent of her husband's heirs, and without the concurrence of her co-widow

*Sir R Finlay, K C, G E A Ross, B Dube*, and *Moti Lal Nehru* for the respondent contended that his adoption was established and was valid according to the laws and customs by which the Jains were governed The adoption of a married man was allowed in Madras, Bombay and in the Punjab [*DeGruyther, K C*, " Not in the Punjab "] Reference was made to the Dattaka Chandrika, Stokes' Hindu Law Books (1865), page 644, paragraph 32 *Nitradayee* v *Bholanath Doss* (1), *Bullubakant Choudree* v *Kishenprea Dassea Chowdrain* (2) The cases of *Sheo Singh Rai* v *Dakho* (3) and *Chotay Lal* v *Chunnoo Lal* (4), though they lay down that in the absence of any special law or custom the ordinary Hindu Law is to be applied to Jains, yet recognise that that community had freed themselves from restrictions adhered to by the orthodox Hindus, and when such laws or customs were by sufficient evidence capable of being ascertained and defined, and were satisfactorily proved, effect ought to be given to them if in accordance with public policy Evidence that a married man has been adopted was evidence of a custom and admissible to aid in proving it; Evidence Act (I of 1872), sections 48 and 19, and here there were numerous instances adduced. As to the circumstances and history of the separation

(1) (1853) 9 S D A Beng 553

(2) (1838) 6 S D A Beng 219

(3) (1878) I L R, 1 All., 688 (701) L R., 5 I. A., 87 (107)

(4) (1878) I. L. R., 4 Calc., 744 (752) L R., 6 I. A., 15 (28)

one account make about six shillings and eight pence sterling." (The *Hidayah* by Grady, p. 44.)

In the above passages the money-value of a *dirham* is correctly estimated and is between three and four annas. On this basis the portion of Fatima, the Prophet's daughter, which was 500 (five hundred) *dirhams* and not 10 (ten) *dirhams*, is commonly calculated among Muhammadans to amount approximately to Rs. 107 of the British coin.

The mistake in the remarks of the learned Judges in *Sughra Bibi* v. *Musa Bibi* (1), is that Fatima's portion is taken to be 10 (ten) *dirhams* while as a matter of fact it was 500 (five hundred) *dirhams*.

The following are a few out of the many passages to show that Fatima's portion was 500 (five hundred) *dirhams* and not 10 (ten) *dirhams* :—

(*a*) Baqir said :—" The Prophet did neither give his daughters in marriage nor did he marry any of his wives on a dower higher than 12 (twelve) *auqiyahs* and a *nush*. "*Nush*" means one-half of an *auqiyah*. One *auqiyah* is 40 *dirhams* and one *nush* is twenty *dirhams*, and thus it (the dower) amounts to 500 (five hundred) *dirhams*. Masalik, Book on Marriage, Vol. I, Tehran edition.

قال الباقر مازوج رسول الله سائر بناته ولا تزوج شيئا من نسائه على اكثر
من اثنتى عشرة اوقيه ونش وهو نصف الاوقية و الاوقيه اربعون والنش
عشرون درهما فذلک خمسمائة درهم - مسالک الافهام کتاب النکاح جلد اول
طبع طهران *

(*b*) According to the Shafaais and the Hanbalis it is desirable that a dower should not be le-s than 10 (ten) *dirhams*. This view is adopted to avoid a conflict with Abu Hanifa's view. It is also desirable that it should not exceed 500 (five hundred) *dirhams*, which was the amount of the dower of the daughters of the Prophet and of his wives. The dower of Ommi Habiba, one of the wives of the Prophet, was no doubt 400 (four hundred) *deenars* (a gold coin), but that was fixed by Najashi as a token of distinction to the Prophet.

Qustalani, a commentary on Sahih Bukhari, Vol. VIII, p. 48-49. Nawal Kishore edition.

(1) (1877) I. L. R., 2 All., 573, at 575.

except a widow with authority of her husband, *Amrito Lall Dutt* v *Surnomoyi* (1), and adoption could take place up to the upanayanam ceremony in cases of the twice born classes, and up to marriage in case of a Sudra, but not after Reference was made to *Ganga Sahai* v *Lekraj* (2), Dr Guru Das Banerjee's Hindu Law of Marriage, 2nd Ed, pages 127, 252,, Vyavastha Chandrika, pages 93 and 102 (at bottom of page), Steele's Hindu Law, page 22, Mayne's Hindu law, 7th Ed, page 133 (note at bottom of page), and page 134 (middle of page), West and Bühler's Digest, page 952, G C Sarkar's Hindu Law, pages 452, 453 (last paragraph but one) and page 454, and *Govindnath Roy* v *Gulabchand* (3) To prove a custom the best evidence must be produced, or the absence of it accounted for, *Ramalakhshmi Ammal* v *Sivanantha Perumal Sethurayar* (4), and it was submitted that in this case the instances produced in evidence did not prove the custom set up, there were very few in which the evidence was satisfactory, and reference was made to the case of *Chandrika Bakhsh* v *Muna Kunwar* (5) in which it was held that a few instances did not sufficiently establish a custom The instances, moreover, even if proved, come from only a small number of places out of all those where the Jain community are settled

1910, *March 9th* —The judgment of their Lordships was delivered by SIR ARTHUR WILSON —

This is an appeal from a judgment and decree of the High Court of Allahabad, which set aside those of the Subordinate Judge of Saharanpur and dismissed the plaintiff's suit

The plaintiff sued as the nearest reversionary heir of one Lala Mittar Sen, a member of the Jain Agarwala community, who lived and died in the district of Saharanpur

The defence to the plaintiff's claim was based on the allegation that the defendant Jambu Prasad was the adopted son of the deceased Lala Mittar Sen, adopted by his senior widow after the death of her husband, and it was contended that the title of the adopted son excluded any right that might otherwise have existed in the plaintiff The first court decided against the

(1) (1900) I L R., 27 Calc., 996 L. R. 27 I A 129

(2) (1886) I L R., 9 All 253

(3) (1833) 5 Sel Rep S D A., Beng, 276

(4) (1872) 14 Moo. I A., 570 (585)

(5) (1902) I. L. R., 24 All., 273 (281) L. R., 29 I. A., 70 (71, 74, 75)

عن ابی سلمة قال سألت عائشة كم كان صداق النبی صلی الله علیه وسلم
قالت كان صداقه لازواجه اثنتی عشرة اوقیة ونش قالت اتدری ما النش قلت
لا قالت نصف اوقیة فتلک خمس مائة درهم ـ مشكوة باب الصداق صفحه ۲۷۷
طبع مجتبائی *

(g) Omar said, "I do not know that the Prophet married any of his wives or gave any of his daughters in marriage with a dower exceeding 12 (twelve) *auqiyahs* (1)"

ما علمت رسول الله صلی الله علیه وسلم نكح شیئا من نسائه ولا انكح شیئا
من بناته علی اكثر من اثنتی عشرة اوقیة ـ مشكوة باب الصداق صفحه ۲۷۷
طبع مجتبائی *

(1) In the Mirqat a commentary of Mishcat, it is noted that the dower of Ommi Habibah, one of the wives of the Prophet, which was 4,000 (four thousand) *dirhams* is an exception, for Najashi fixed it without its being fixed by the Prophet It is also noted that the amount mentioned by Omar is to be explained in one of the two following ways —

(1) He did not mention the *nush* as it is a fraction

(2) The exact amount, *i e* 12½ and the dower of Ommi Habibah were not known to him A translation of this is to be found in Tagore Law Lectures for 1891 92 on p 111 Art 730 (121), Vol I It runs as follows —

Omar-Ibn Khattab says —' I do not know that His Highness married any of his wives or gave any of his daughters in marriage with settlements more than five hundred *dirhams*, nay, the portion of Fatima was four hundred *dirhams*"

This is not a translation of the Arabic text, in which 500 (five hundred) *dirhams* and Fatima s portion are not mentioned.

(h) It is reported from Ommi Habibah (that) ' she was the wife of Abdullah (Obedullah) son of *Jahsh* He died in Ethiopia and Najashi gave her in marriage to the Prophet, fixing her dower on his behalf at 4,000 (four thousand), according to another report at 4 000 (four thousand) *dirhams*, and sent her to the Prophet with Shurhabil son of Hasanah (2) Mishcat, p 277

عن ام حبیبة انها كانت تحت عبد ( عبید ) الله بن جحش فمات
بارض الحبشة فزوجها النجاشی النبی صلی الله علیه وسلم و مهرها عنه اربعة
آلاف وفی روایة اربعة آلاف درهم و بعث بها الی رسول الله صلی الله علیه وسلم مع
شرحبیل بن حسنة ـ مشكوة باب الصداق صفحه ۲۷۷ طبع مجتبائی *

precedent if in any future instance fuller evidence regarding the alleged custom should be forthcoming

But with regard to the relative rights of the parties to the present case, who have had full opportunity of producing whatever evidence they desired to produce, the case was properly dealt with by the High Court upon the evidence before it And their Lordships are not prepared to dissent from the finding of the learned Judges of the High Court that the evidence in the case supported the custom

Their Lordships will humbly advise His Majesty that this appeal should be dismissed The appellants will pay the costs

*Appeal dismissed*

Solicitors for the appellant —*Ranken Ford, Ford, & Chester*

Solicitors for the respondent —*Barrow, Rogers & Nevill*

J V. W

---

## APPELLATE CIVIL

---

*Before Sir John Stanley, Knight Chief Justice and Mr Justice Banerji.*

DEBI MANGAL PRASAD SINGH (PLAINTIFF) *v* MAHADEO PRASAD SINGH AND OTHERS (DEFENDANTS) *

*Hindu law—Mitakshara—Joint Hindu family—Mother's share on partition—Stridhan—Succession*

*Held* that according to the Mitakshara the share which the mother in a joint Hindu family obtains after the death of the father on partition of the joint family property between the mother and the sons, becomes the mother's *stridhan*, which devolves on her death upon her own heirs and not upon the heirs of her husband *Chhiddu* v *Naubat* (1) and *Gambhir Singh* v *Makraddhaj* (2) followed *Sheo Shankar* v *Debi Sahai* (3) distinguished

THE facts of this case were as follows —

One Gaya Prasad Singh died leaving him surviving Sahibzad Kunwari, his widow, and three sons, namely Sheo Prasad Singh, Mahadeo Singh, and Sitla Bakhsh Singh Sheo Prasad Singh then died leaving him surviving his widow, Dharamraj Kunwari, and a minor son, Debi Mangal Prasad Singh

On the 4th of January, 1893, Debi Mangal Prasad under the guardianship of his mother, Dharamraj Kunwari, sued his

---

* First Appeal No 49 of 1908 from a decree of Gokul Prasad Subordinate Judge of Gorakhpur, dated the 14th of December 1907

(1) (1901) I L R 24 All 67 (2) (1907) 4 A L J [illegible]3
(3) (1903) I L R, 25 All 468

sale deed to be Rs 1,000 only, and, accordingly, this deed was executed on stamp paper of the value of Rs 10 There was a reference in this deed to the former sale deed, beyond that, there was no allusion to the Rs 19 000 When the deed was presented for registration the Sub-Registrar, who happened to remember that the former sale deed was for Rs 20 000, impounded it and sent it to the Collector The Collector, without calling upon Rameshar to make good the deficiency together with a penalty, directed him to be criminally prosecuted Proceedings were thereupon taken against Rameshar, with the result that he was convicted and sentenced under section 64 (*a*) of the Stamp Act to a fine of Rs 400 reduced, on appeal to Rs 100 He thereupon applied in revision to the High Court

Mr *A P Dube*, for the applicant, contended that the prosecution and conviction were bad in law The Collector had no jurisdiction to order the prosecution unless and until he had proceeded under section 40, cl (*b*) of the Stamp Act to realise the deficiency and penalty The language of section 40 was imperative—" he shall adopt the following procedure" The Collector's power to order prosecution was a matter of mere discretion, section 40 laid down what it was his duty to do before exercising such discretion The Stamp Act was a fiscal enactment and must be construed strictly The procedure of the Collector was calculated to frustrate the object of the enactment which was to protect against loss of revenue, and was, therefore, clearly wrong He ought, in the first instance, to have asked the party to make good the deficiency with fine He relied on *Empress* v *Soddanund Mahanty* (1) and *Empress* v *Janki* (2) He further contended that there was no intention to defraud The former deed was mentioned distinctly in the letter at the very outset The first deed would not have been mentioned at all if there had been a wish to defraud The second deed had for its object the restoration of the *status quo*, and all that the parties had to do was to reconvey the property and get back the money that had actually passed, namely, Rs 1,000 So the consideration for the second deed was Rs 1,000 only Moreover, the stamp duty was payable by the vendees (section 29, cl (*c*), of the Stamp Act), the vendor,

(1) (1881) I L R 8 Calc 259 (2) (1882) I L R, 7 Bom 82

*Singh* their Lordships refer to the case of *Phopi Ram* v *Rukmin Kuar* (1) with approval There seems to be a conflict of authorities on this point in this Hon'ble Court At least the earlier rulings would support the appellants' contention, and their Lordships in the case of *Chhiddu* v *Naubat* (2) pronounce their judgments with considerable hesitation

Mr *B E O Conor* (with him Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Moti Lal Nehru*, for whom Babu *Durga Charan Banerji*) for the respondents —

So far as the case now stands there is absolute *consensus* of opinion amongst the learned judges who have dealt with this point The point will be found fully discussed by AIKMAN, J, in *Chhiddu* v *Naubat* (2) For the purpose of this case I may well adopt the argument on behalf of the appellants in the case of *Sri Pal Rai* v *Surajbali* (3) This point again arose in *Gambhir Singh* v *Makraddhuj* (4) and in *Mathura Prasad* v *Ganga Ram* (5) and was decided in favour of the view for which I contend. A learned Hindu lawyer and author has upheld this view see Golap Chandra Sarkar Shastri, *Hindu Law* (3rd edition, p 385) The Privy Council have in no case expressed any opinion directly on this point

The Hon'ble Pandit *Sundar Lal*, in reply —If there is a conflict of authorities on this point, as I have shown there is, the case should be referred to a larger Bench to settle the difference so far as this Court is concerned The case of *Bhupal Singh* v *Mohan Singh* (6) establishes the contrary proposition, and the earliest ruling in these provinces in support of the appellant's contention will be found in *Baldeo Singh* v *Mahabeer Singh* (7) The interpretation of the *Mitakshara* has been going up to the Privy Council, where it has been consistently hold that the view expressed therein is wrong The latest pronouncement of their Lordships will be found in *Sheo Shankar* v *Debi Sahai* (8) where their Lordships say that they are not prepared to accept the wider definition

STANLEY, C J, and BANERJI, J —The question raised in this appeal appears to us to be concluded by the decision in the case

(1) Weekly Notes 1895 p 84
(2) (1901) I. L. R 24 All, 67
(3) (1901) I L. R. 24 All. 82.
(4) (1907) 4 A L J 673
(5) (1910) 7 A. L. J 69
(6) (1897) I L. R 19 All., 324
(7) (1866) N W P H. C Rep 155
(8) (1903) I L. R 25 All 468

any, and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein

The first point taken in revision is that the Collector should not have instituted this prosecution without first levying the deficient duty and penalty on the deed in question This the Collector could not have done The deed was fully stamped on a sum of Rs 1,000, the consideration as stated therein The whole point of the prosecution is that the consideration for the sale is not fully and truly set forth We are of opinion that it is not The actual consideration for the sale deed of the 2nd of March, 1909, was the cash payment of Rs 1,000 plus an oral agreement cancelling the liability under which Rameshar Das lay to pay Rs 19,000 on demand to the vendees under the said deed It seems to us that we are not even concerned with the question whether, in the event of the said vendees, namely, Mahadeo Prasad and Sita Ram, behaving dishonestly and instituting a suit to enforce the provisions of the original sale deed of the 12th of September, 1908, the Civil Court could, in view of the provisions of the Indian Evidence Ac, permit Rameshar Das to prove this oral agreement The question we have to answer is what was the real consideration for the second sale deed, and that consideration admittedly was not the mere payment of Rs 1,000

We have next to consider whether Government has as a matter of fact been defrauded of stamp duty Had the consideration been fully and truly set forth in the sale deed, it seems clear that in view of the provisions of section 24 of the Indian Stamp Act, the conveyance in question would have been chargeable with stamp duty upon the full sum of Rs 20 000 The only exception to be found in section 24 is the proviso in favour of a mortgagee purchasing the equity of redemption But this is obviously inapplicable to the facts before us, and only serves to make it clearer that on a conveyance like the present stamp duty must be calculated on the cash payment plus any debt or liability thereby remitted or transferred A suggestion was thrown out in the course of argument that the parties might have availed themselves of the provisions of article 17 or article 55 of the first schedule to the Indian Stamp Ac, so as to cancel the

sons becomes the mother's *stridhan*, which devolves on her death upon her own heirs and not upon the heirs of her husband. The question in the case appears to have been carefully considered, and the ruling has been followed in several later cases including the case of *Gambhir Singh* v *Makraddhuj* (1). In this last mentioned case it was contended that having regard to the ruling of the Privy Council in *Sheo Shankar Lal* v *Debi Sahai* (2) the rulings of this Court must be deemed to be of no authority. The ruling in question is not a ruling upon the point which is now before the Court. What their Lordships in that case held was that under the Hindu Law of the Benares School property which a woman has obtained by inheritance from a female is not her *stridhan* in such a sense that on her death it passes to her *stridhan* heirs in the female line to the exclusion of males. This is not the question which is before us. Some of the considerations which arise in that case may have a bearing upon the point before us. The question is by no means free from difficulty, as has been pointed out in the case of *Chhiddu* v. *Naubat*. We think that we ought to abide by that decision, unless and until it is reversed by their Lordships of the Privy Council. We do not think that we ought to go behind it, and we therefore dismiss this appeal with costs.

*Appeal dismissed.*

---

*Before Mr Justice Sir George Knox and Mr Justice Piggott*

CHOTE SINGH (DECREE HOLDER) *v*. ISHWARI AND OTHERS (JUDGMENT DEBTORS).*

*Execution of decree—Limitation—Act No XV of 1877 (Indian Limitation Act) schedule II article 179(4)—Step in aid of execution—Civil Procedure Code (1882), sections 257A 258—Application to certify payment made out of court.*

Although a decree under section 88 of the Transfer of Property Act, 1882, may not be capable of adjustment under section 257A of the Code of Civil Procedure 1882 yet where the parties had professed to make such an adjustment, and the judgment debtor having paid certain instalments of the decretal money the decree holder had applied to the court to have such payments certified under section 258 of the Code it was *held* that such applications operated to keep the decree alive although at the time there might have been no application

* Second Appeal No 518 of 1909 from a decree of H J Bell District Judge of Aligarh dated the 10th of March 1909 confirming a decree of Muhammad Shafi Subordinate Judge of Aligarh dated the 6th of July, 1908

(1) (1907) 4 A. L J, 673 (2) (1903) I. L. R., 25 All., 468.

# APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

BAKHTAWAR AND ANOTHER (DEFENDANTS) *v.* BHAGWANA (PLAINTIFF) AND BADAM AND OTHERS (DEFENDANTS)*

*Hindu Law—Hindu widow—Gift made by Hindu widow with consent of next reversioners—Suit by more remote reversioners to set aside the gift*

A gift by a Hindu widow, who succeeded to the separate estate of her deceased husband, of such estate is not valid and does not create a title which cannot be impeached by the remoter reversioner because it has been made with the consent of the next reversioner. *Ramphal* v *Tula Kuari* (1) followed. *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2) distinguished. *Rani Anund Koer* v. *The Court of Wards* (3) referred to.

THE plaintiffs brought this suit to get a deed of gift cancelled and to have it declared that a deed of gift executed by Musammat Kauli, a Hindu widow, in favour of Bakhtawar, defendant appellant, was inoperative as against the plaintiffs respondents, who were contingent reversioners The defence was that the plaintiffs being contingent reversioners had no right to maintain a declaratory suit and that the deed of gift in question having been executed with the consent of Jas Ram, who was the only presumptive reversioner, passed the absolute estate and was valid. The court of first instance (Additional Judge of Meerut) held that the contingent reversioners could maintain the suit and although the presumptive reversioners consented to the gift, and attested the deed of gift, yet such attestation was not sufficient to pass an absolute title.

Babu *Durga Charan Banerji* for the defendants appellants contended that Jas Ram, who was the only nearest presumptive reversioner, having consented, the gift was a gift of the absolute estate, and the plaintiffs who were remote reversioners could not maintain a suit unless they proved that the presumptive reversioner was fraudulently colluding with the donor (widow). He referred to *Rani Anund Koer* v. *The Court of Wards* (3), *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (4), *Nobokishore* v *Hari Nath* (5), *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2) and *Ramphal Rai* v *Tula Kuari* (1)

* First Appeal No 207 of 1908, from a decree of Kanhaiya Lal, Additional Judge of Meerut, dated the 8th of May, 1908

(1) (1883) I L R, 6 All, 116
(2) (1907) I L R, 30 All, 1
(3) (1880) L. R, 8 I A, 14.
(4) (1861) 8 Moo I. A, 529, at 551.
(5) (1884) I L R, 10 Calc, 1102

Munshi *Gulzari Lal*, for the respondents, submitted that as between 1901 and 1908 no execution case was pending, there could be no "step in aid of execution" Moreover, as the decree was one under section 88, there could be no adjustment of that decree under section 257A of the Code of 1882 He relied on *Kashi Prasad* v *Sheo Sahai* (1)

Mr *G W Dillon* in reply, submitted that section 257A was wide enough to cover all decrees and that the case in I L R, 19 All 186 was wrongly decided Moreover, as the judgment debtor was a party to the agreement, he was estopped

KNOX and PIGGOTT, JJ —This is a decree holder's appeal in an execution case Both courts below have held the decree to be barred by limitation A preliminary decree under section 88 of the Transfer of Property Act was passed on December 24th, 1889, which was followed by a decree absolute for sale on September 11th, 1890 Various proceedings in execution followed the decree holder apparently granting extensions of time in return for part payment The learned District Judge seems to have been under some misapprehension when he spoke of execution being "apparently barred by time" when a payment of Rs 140 was certified in May 1899 It has been conceded before us in argument that the decree was alive and capable of execution when an application for the same was made on July 13th, 1901 This application was pending and sale had actually been ordered when on December 20th, 1901, the parties presented to the court and attested before it an agreement under the provisions of section 257A of the former Code of Civil Procedure, Act XIV of 1882 According to this agreement the judgment-debtors were to pay Rs 1,800 (a larger sum than was due from them under the decree), but without further interest, and in certain specified instalments The property was to remain hypothecated until the whole was paid and in case of default in the payment of any one instalment the decree holder was to become entitled to "execute his decree" Payments under this compromise were certified to the court on June 11th, 1904, and again on May 14th, 1906 Finally, the judgment debtors having made default, the present application was made on May 22nd, 1908 The

(1) (1896) I L R 19 All 186

criticised the judgment in *Ramphal Rai* v *Tula Kuari*, and rejected the rule laid down by this Court, namely, "that in order to validate an alienation by a Hindu widow of her deceased husband's estate for purposes other than those sanctioned by the Hindu Law, it must have the consent of all those among his kindred who can reasonably be regarded as having an interest in questioning the transaction" They agreed with the High Court of Calcutta that "ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible" Applying that rule they held in agreement with the Judicial Commissioner that the consent to the sales of six reversionary heirs, there being no other reversionary heir living at the time of the transfers, superior or equal in degree to those reversioners, was sufficient In the judgment they expressed their unwillingness to extend a widow's power of alienation beyond its present limits It does not appear to us that this decision of their Lordships can be treated as overruling the decision in *Ramphal Rai* v *Tula Kuari*, the transaction in which case was a gift and not a sale for consideration We think therefore that the court below rightly decided this question

It is further contended that the plaintiffs being remote reversionary heirs are not entitled to maintain a suit to have the gift made by Musammat Kauli questioned There is no force, we think, in this contention Jas Ram the nearest reversionary heir by consenting to the gift and concurring in the act of Musammat Kauli has precluded himself from disputing the validity of the impeached gift Consequently the plaintiffs as next presumable reversioners would be entitled to sue

In the case of *Rani Anund Koer* v *The Court of Wards* (1) their Lordships of the Privy Council, at page 772, observe "It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote The right to sue must in their Lordships' opinion be limited. If the nearest

(1) (1880) L. R. 8 I. A., 14; I. L. R. 6 Calc. 764

been struck off should be restored to the file, and that the petition under section 258, Civil Procedure Code, be "placed on the record" The *ratio decidendi* of this case is in favour of the present appellant It is pointed out that "the effect of the certificate is to satisfy the decree so far as the sum certified is concerned" It must be remembered that without such payment being certified, on the application of one or other of the parties, it could not be recognized as a payment by any court subsequently executing the decree An application by the decree-holder under section 258 of Act XIV of 1882 therefore calls upon the court to do a certain act which *ipso facto* satisfies the decree to the extent of the payment certified, and without which the decree would not be satisfied to any extent whatever We hold that such an application satisfies the requirements of article 179(4) of the second schedule to the Indian Limitation Act (XV of 1877) and that no sound distinction can be drawn between the present case and that reported in I L R, 12 All, 399

We therefore set aside the orders of both the courts below and direct the court of first instance to readmit this application for execution and to proceed with it according to law The decree holder will get his costs in this and in the lower appellate court

*Appeal decreed*

---

*Before Sir John Stanley Knight Chief Justice and Mr Justice Piggott*

PRAN SUKH (PLAINTIFF) *v* SALIG RAM AND OTHERS (DEFENDANTS) *

*Pre emption—Wajib ul arz—Custom or contract—Partition of village—Separate wajib ul arzes—Change in the language*

A village originally undivided was first partitioned into several mahals with a separate settlement wajib ul arz for each Subsequently one of these mahals was subdivided into two and fresh wajib ul arzes were framed for these two mahals One of these new mahals was in turn divided into two but no fresh wajib ul-arzes were then framed The wajib ul arzes framed at the first and second partitions differed *inter se* as to their conditions relative to pre-emption *Held* that there was evidence only of a contract for pre-emption which, so far as the two last formed mahals were concerned had ceased to exist even before the expiry of the term of the settlement

---

* Second Appeal No 837 of 1908 from a decree of B J Dalal District Judge of Agra, dated the 12th of May 1908 modifying a decree of Sheo Prasad, Subordinate Judge of Agra dated the 25th of November, 1907

the defendants pleaded that the registration of the mortgage deed was not valid, inasmuch as the power of attorney in virtue of which it was effected had not been authenticated in the manner required by section 33 of the Indian Registration Act, 1877 The court of first instance repelled the objection as to the validity of the registration and decreed the suit One of the defendants appealed

Babu *Jogindro Nath Chaudhri* (with him The Hon'ble Pandit *Moti Lal Nehru* and Dr *Satish Chandra Banerji*) for the appellant, referred to sections 31, 32 and 33 of the Registration Act (III of 1877) and contended that the registration was invalid because the mortgage deed had not been presented by an agent or representative of Mul Kunwar duly authorized by a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub district the principal resided He relied upon *Mujib un nissa* v *Abdur Rahim* (1) and *Ishri Prasad* v *Baij Nath* (2)

The Hon'ble Pandit *Sundar Lal* (with him Mr *G W Dillon*, Babu *Durga Charan Banerji* and Munshi *Jang Bahadur Lal*) for the respondents, relied upon the *proviso* to section 33 of the Registration Act and contended that Mul Kunwar as a *parda nashin* lady was exempt by law from personal appearance in court and was not therefore required to attend at any registration office for the purpose of executing any power of attorney The Sub Registrar in this case went to the house of the lady and was satisfied that the power of attorney had been voluntarily executed by her

Babu *Jogindro Nath Chaudhri*, in reply —

The *proviso* does not dispense with execution before the Sub-Registrar, but makes provision for the case where a question is raised as to the *voluntary* execution of a power of attorney There is moreover a distinction between an endorsement regarding execution and an authentication by the Registrar (*vide* rule 147, Registration Manual) Here the power of attorney was never authenticated by the Sub Registrar

STANLEY, C J and BANERJI, J —The suit out of which this appeal has arisen was brought by the plaintiffs respondents for

(1) (1900) I L R 23 All 233 241 (2) (1906) I L R, 28 All, 707

been struck off should be restored to the file, and that the petition under section 258, Civil Procedure Code, be "placed on the record". The *ratio decidendi* of this case is in favour of the present appellant. It is pointed out that "the effect of the certificate is to satisfy the decree so far as the sum certified is concerned." It must be remembered that without such payment being certified, on the application of one or other of the parties, it could not be recognized as a payment by any court subsequently executing the decree. An application by the decree-holder under section 258 of Act XIV of 1882 therefore calls upon the court to do a certain act which *ipso facto* satisfies the decree to the extent of the payment certified, and without which the decree would not be satisfied to any extent whatever. We hold that such an application satisfies the requirements of article 179(4) of the second schedule to the Indian Limitation Act (XV of 1877) and that no sound distinction can be drawn between the present case and that reported in I. L. R., 12 All., 399.

We therefore set aside the orders of both the courts below and direct the court of first instance to readmit this application for execution and to proceed with it according to law. The decree holder will get his costs in this and in the lower appellate court.

*Appeal decreed.*

---

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Piggott.*

PRAN SUKH (PLAINTIFF) *v.* SALIG RAM AND OTHERS (DEFENDANTS).*

*Pre-emption—Wajib-ul-arz—Custom or contract—Partition of village—Separate wajib-ul-arzes—Change in the language.*

A village originally undivided was first partitioned into several mahals with a separate settlement wajib-ul-arz for each. Subsequently one of these mahals was subdivided into two and fresh wajib-ul-arzes were framed for these two mahals. One of these new mahals was in turn divided into two, but no fresh wajib-ul-arzes were then framed. The wajib-ul-arzes framed at the first and second partitions differed *inter se* as to their conditions relating to pre-emption. *Held* that there was evidence only of a contract for pre-emption which, so far as the two last formed mahals were concerned, had ceased to exist even before the expiry of the term of the settlement.

---

* Second Appeal No. 827 of 1908 from a decree of B. J. Dalal, District Judge of Agra, dated the 12th of May 1908, modifying a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 25th of November, 1907.

Sub-Registrar may either go himself to the house of the person purporting to be the principal and examine him or issue a commission for his examination Musammat Mul Kunwar was a *parda nashin* lady who was exempt from personal attendance in court In the case of such a person, under the *proviso* to which we have referred, it is not necessary that she should execute the power of attorney in the presence of the Registrar or Sub Registrar, but all that is required is that the Registrar or Sub Registrar should satisfy himself that the power of attorney was voluntarily executed by her. We are unable to agree with the contention of the learned advocate for the appellant that the *proviso* requires that an executant of a power of attorney should sign it in the presence of the Registrar or Sub Registrar In the present case the Sub-Registrar has endorsed on the power of attorney that he had satisfied himself that Musammat Mul Kunwar had of her own free will executed the mukhtar nama. He went to her house and questioned her and she admitted to him that she had executed the document of her own free will and accord We think that the requirements of section 33 were carried out in the case of the power of attorney executed by Musammat Mul Kunwar, inasmuch as even if she executed it before its presentation for registration she admitted execution, and the Sub Registrar satisfied himself that she had voluntarily executed it, and authenticated the document by a certificate to the effect that he had satisfied himself that she had voluntarily executed it As the mortgage deed in question was presented for registration by the agent who held a power of attorney authenticated in the manner provided by section 33, there was a valid presentation of the document and there was no defect in it in the matter of registration We therefore dismiss the appeal with costs to be paid to the plaintiffs respondents The objections under section 561 of Act No XIV of 1882 are dismissed

*Appeal dismissed.*

"A separate wajib-ul arz was prepared for each The terms of the pre emption clause were —

'The property should be sold or mortgaged first to near relatives, if they are co sharers of the zamindari as well on their refusal to other owners of the mahal, and if they do not take, then to the owners of other mahals, and finally to strangers'

"Prior to the sale in suit mahal Piyari Kuar az Ganeshi Lal was partitioned into two mahals —

(1) Mahal Piyari Kuar az Ganeshi Lal

(2) Mahal Nagpal

"No wajib ul arz was prepared at the time The property in suit is situated in mahal Piyari Kuar of the second partition It cannot possibly be urged that a custom of pre emption existed in the village which has come down to the present from time immemorial, because we find different rules set up at different periods of time When originally there was a joint mauza Kolara, the co sharers who were relatives had the first right of pre emption and then all the other co sharers of Kolara in an equal degree Then the devolution of the right altered, first came the relatives in the same mahal, for instance, Dilsukh, then co sharers of mahal Dilsukh and then the rest of the co sharers of the former mauza Kolara Relatives who went to other mahals were put in the third category while non relatives of the same mahal were entered in the same category Hence the pre-emptive rule was not the same as it was before When mahal Ganeshi Lal was partitioned there was a further change in the rule Thus the right of pre emption was one entirely based on contract. When mahal Piyari Kuar az Ganeshi Lal was partitioned, no fresh contract was entered into by the co sharers of the two mahals, and so the right of pre emption, based on a former contract, lapsed The ruling quoted by the lower court, *Gobind Ram* v *Masih-ul lah Khan* (1), does not apply to this case, because no custom of pre-emption is proved At every partition a fresh contract was entered into, and the right of pre emption existed as modified by the last contract But at the last partition no contract was entered into at all, so no pre-emptive right accrued to the co sharers of the mahals formed at the last partition out of mahal Ram Piyari I hold that no right of pre-emption exists with respect to the property in suit

(1) (1907) I L R., 29 All. 205

any co parcener, *Gopal Das* v *Badri Nath* (1), *Bungsee Singh* v *Soodist Lall* (2), *Hari Vasudev Kamat* v *Mahadu Dad Gavda* (3) The case in I L R, 29 All 311, relied upon by the District Judge is distinguishable Even if the analogy of the law of partnership be applied, that is in favour of the plaintiff, see Indian Contract Act, section 230, and *Agacio* v *Forbes* (4) If the plaintiff acted as an agent it is not pleaded that the principal was disclosed

Munshi *Gokul Prasad*, for the respondent

The *sattas* properly interpreted are in favour of the firm and not in that of the plaintiff in his individual capacity The existence of a written instrument does not make any difference in principle It is the family which is interested in the contract and which must be represented in the suit The authorities are collected in *Shamrathi Singh* v *Kishan Prasad* (5) and *Sheshan Patter* v *Veera Raghavan Patter* (6) and they entirely support the respondent

Dr *Satish Chandra Banerji* was not heard in reply.

STANLEY, C J, and BANERJI, J—The plaintiff in the suit out of which this appeal has arisen in conjunction with other members of his family carried on a business for the sale of gold and silver lace His case is that on the 1st of August, 1903, the defendant sold to him through some brokers some bars of silver and took from the plaintiff Rs 100 in cash by way of earnest money and promised to deliver the silver on a certain date, that subsequently the defendant took a further advance in respect of the sale of other bars of silver The defendant failed to fulfil his contract, and the suit out of which this appeal has arisen was brought by the plaintiff for recovery of damages for breach of his contract by the defendant On the occasion of the agreement the defendant executed *sattas* in favour of the plaintiff The plaintiff, as we have said, carries on business along with other members of his family under the style of Durga Prasad The defendant defended the suit on various grounds, and, amongst others, that the agreement entered into with the plaintiff was

(1) (1904) I L R 27 All 3 1
(2) (1891) I L R 7 Calc 739
(3) (1895) I L R 20 Bom 435
(4) (18 3) 14 Moo P C 160.
(5) (1907) I L R 29 All 311
( ) (1903) I L R 32 Mad 294

member, in appeal No 22 of 1909 under the Letters Patent, *Dhanpal* v *Nand Kishore* The facts in that case were somewhat similar to those in the present case and the learned Judge of this Court, from whom the appeal under the Letters Patent was preferred, concurred with the lower appellate court, giving reasons for the conclusion at which he arrived and which commend themselves to us We therefore, dismiss this appeal with costs

*Appeal dismissed*

---

*Before Sir John Stanley Knight Chief Justice and Mr Justice Banerji*

DORI AND OTHERS (PLAINTIFFS) v JIWAN RAM (DEFENDANT) *

*Pre emption—Wajib ul arz—Custom or contract—Construction of document*

The wajib ul arz of an undivided village gave a right of pre empt on first to a near co sharer (*hissadar karib*) and then to a co sharer in the village (*hissadar deh*) Subsequently the village was divided by perfect partition No new wajib ul arz was framed Property situated in one of the new mahals was sold to a stranger and a suit for pre emption was brought by sharers in one of the other mahals claiming as *hissadaran deh*

*Held* by STANLEY C J —That the plaintiff was entitled to pre empt notwithstanding the partition and that the words *hissadar deh* as used in this wajib ul arz meant a sharer in the village

*Dalganjan Singh* v *Kalka Singh* (1) distinguished *Sahib Ali* v *Fatima Bibi* (2) *Mithu Lal* v *Muhammad Ahmad Said Khan* (3) *Abdul Hai* v *Nain Singh* (4), *Motee Sah* v *Mussumat Goklee* (5) *Gokal Singh* v *Mannu Lal* (6), *Abbas Ali* v *Ghulam Nabi* (7) *Mata Din* v *Mahesh Prasad* (8) *Ram Din* v *Lokhar Singh* (9), *Auseri Lal* v *Ram Bhajan Lal* (10) and *Gobind Ram* v *Masih ul lah Khan* (11) referred to

*Held* by BANERJI J —That the plaintiff pre emptor could not pre-empt after the partition of the village as although he was a sharer in the village he was not a co sharer of the vendor and that the words *hissadar deh* as used in the wajib ul arz meant a co sharer of the undivided village for which the wajib ul arz had been prepared *Dalganjan Singh* v *Kalka Singh* (1) followed *Janki* v *Ram Partap* (12) and *Abdul Hai* v *Nain Singh* (4) referred to

THIS was an appeal under section 10 of the Letters Patent against the decision of Aikman, J The facts of the case appear from the judgement under appeal, which was as follows —

"This appeal arises out of a suit brought by the respondents to enforce a right of pre-emption The suit was based on the terms of the wajib-ul arz of

---

* Appeal No. 63 of 1909 under section 10 of the Letters Patent

(1) (1899) I L R 22 All, 1
(2) (1909) I L R 31 All 63
(3) Weekly Notes 1899 p 49
(4) (1897) I L R., 20 All 93
(5) (1861) S D A, N W P, Vol 1, 500
(6) (1885) I L R, 7 All. 772
(7) Weekly Notes 1891 p 137
(8) Weekly Notes 1892 p 100
(9) (1905) I L R, 27 All 553
(10) (1905) I L R 27 All. 60
(11) (1907) I L R, 29 All, 295
(12) (1905) I L R, 28 All 268

family were not necessary parties. The present case resembles that of *Gopal Das* v. *Badri Nath* (1), in which this Bench held that where a contract is entered into on half of a joint family business by the managing members of the firm in their own name, it is not necessary that any members of the joint family other than those who entered into the contract should be parties to the suit brought thereon.

The learned District Judge relied upon the ruling of a Bench of this Court, of which one of us was a member, in the case of *Shamrathi Singh* v. *Kishan Prasad* (2). The facts of that case are not similar to those of the present case. There the managing members of a joint Hindu family, carrying on a joint family business, instituted a suit in their own names against debtors of the family for a debt due to the family, without joining with them in the suit either as plaintiffs or defendants the other members of the family. That case is clearly distinguishable from the present. There the debt sought to be recovered was a debt due to the joint members of the family and it was accordingly held that some of the members only of the joint family could not maintain a suit for its recovery, without joining the other members of the family in the suit.

For these reasons we think that the decision of the learned District Judge is erroneous, and we set it aside. As he decided the appeal before him upon the question of non joinder of parties and has not determined the other issues raised in the appeal, we remand the case under the provisions of order 41, rule 23, of the Code of Civil Procedure, to the lower appellate court with directions that it be readmitted in the file of pending appeals in its original number and be disposed of according to law. The appellant will have his costs of this appeal. All other costs will abide the event.

*Appeal decreed and cause remanded.*

(1) (1904) I. L. R. 27 All. 361. (2) (1907) I. L. R. 29 All., 311.

evidenced by the wajib ul arz were entitled to claim pre-emption He cited *Gobind Ram* v *Masih-ullah Khan* (1)

Sir Arthur Strachey in *Dalganjan Singh's* case ruled that mere partition would not put an end to a custom, and that each case must be decided upon its own merits In the present case, reading of the wajib ul arz as a whole, it is manifest that per ons holding shares in the village had a right of pre emption The custom affected the whole village and could not be curtailed by reason of partition In the case of *Dalganjan Singh*, upon a construction of the particular wajib ul-arz, it was held that the pre emptor should have owned a share of an undivided village, as was the case in *Sahib Ali* v *Fatima Bibi* (2) The opening words of the present wajib ul arz negatived any such common bond

Babu *Jogindro Nath Mukerji* (with him Babu *Sital Prasad Ghosh*) for the respondent —The case of *Dalganjan Singh* is exactly on all fours with the present case After the partition the plaintiffs owned a share in a separate mahal, and therefore ceased to be a co sharer

STANLEY, C J —In this appeal is involved one of the vexed questions in regard to the right of pre emption which frequently come before the Court In the suit out of which it has arisen the plaintiffs appellants claimed a right to pre empt a sale to Jiwan Ram of a five biswa share in a certain village relying upon the provisions of the wajib ul arz of 1272 Fasli, which gave a right of pre emption, first, to a near sharer (*hissadar karib*), and secondly, to another sharer in the village (*dusre hissadar deh*) The purchaser is a stranger to the village The village was recently partitioned, but no new wajib ul arz was framed on the occasion of the partition The plaintiff is a co sharer in one of the mahals into which the village is now divided, but has no share in the mahal in which the property purchased by Jiwan Ram is situate

Outside the wajib ul-arz neither side produced any evidence The wajib ul arz is *primâ facie* evidence of the existence of the custom which it records, and the only question is as to the true construction to be placed upon it The learned Judge of this Court from whose decision this appeal has been preferred held,

(1) (1907) I. L. R 29 All. 293 (2) (1909) I L. R., 32 All., 63

dealing with questions of pre emption, than as a ruling which would govern individual cases As my brother Banerji said in his judgement in it, "the question in each case is that of the construction of the nature of the particular custom or contract on which the claim for pre emption is based, and whether the custom or contract can apply to the altered state of things which has come into existence since a perfect partition has been effected"

Now let us look more closely into the facts of that case In the first place, it will be observed that chapter II of the wajib ul arz deals with the rights of co sharers *among themselves* Similar words were held by my brother Banerji and myself in the case of *Sahib Ali* v *Fatima Bibi* (1) to limit the meaning of the expression "*malikan deh*" to co sharers between whom and the vendor there was the common bond of being co sharers, and that as the plaintiff was not a co-sharer with the vendor, she had no right of pre emption The facts of that case were similar in fact to those in *Dalganjan Singh* v *Kalka Singh*, and we disposed of the case accordingly

In the wajib ul arz before us no similar words appear The heading of the clause in the wajib ul arz dealing with pre emption is "Relating to the right of pre emption" There is no heading to chapter II, in which is embraced the words dealing with pre emption Nothing is to be found in it to qualify the plain and simple meaning of the words *hissadar deh*, namely a sharer in the village or person holding a share in the village area But let us see what was the view expressed by the learned Chief Justice in his judgement and what was actually decided in *Dalganjan Singh's* case He refers to the heading in the wajib ul arz in the Chapter on pre emption, and, after commenting on the view expressed by Mr Justice Blair that upon the partition of a village into mahals the old wajib ul arz disappeared with the legal entity to which it applied, he observes —"It appears to me to be incorrect to say that upon a perfect partition of a mahal, the wajib ul arz necessarily disappears or ceases to exist There is no such general rule of law." Later on he observes —"In the absence

(1) (1909) I L. R., 32 All., 63.

# THE INDIAN LAW REPORTS

*Published in FOUR SERIES viz —*

*CALCUTTA MADRAS BOMBAY AND ALLAHABAD*

---

The Indian Law Reports published under the authority of the Governor General in Co[illegible] are printed in monthly parts which are issued as soon as possible after the first of each month [illegible] Madras H[illegible] the S[illegible] not sub[illegible] Bombay [illegible]

Persons desiring to subscribe for or purchase the reports should apply to—
the Officer in charge *Bengal Secretariat Book Dépôt Calcutta or*
the Superintendent Government Press Madras or
the Superintendent Government Central Press Bombay, or
THE CURATOR OF GOVERNMENT BOOKS United Provinces Allahabad.

## PRICES.

The terms of subscription and the terms on which current issues and back numbers are sold, are as follows —

| | Without postage | With Indian postage | With Foreign postage |
|---|---|---|---|
| | Rs a p | Rs a. p. | Rs a p. |
| COMPLETE SERIES— | | | |
| Current issues per annum | | 22 8 0 | 28 0 0 |
| Back numbers per annum | 20 0 0 | 22 8 0 | 28 0 0 |
| CALCUTTA SERIES— | | | |
| Current issues or back numbers per annum | 10 0 0 | 12 8 0 | 14 0 0 |
| MADRAS BOMBAY OR ALLAHABAD SERIES— | | | |
| Current issues or back numbers per annum | 6 0 0 | 7 0 0 | 8 0 0 |
| ANY MONTHLY PART— | | | |
| Calcutta Series | 2 0 0 | 2 0 0 | 2 0 0 |
| Madras Bombay or Allahabad Series | 1 0 0 | 1 0 0 | 1 0 0 |

*All payments must be made in advance* Remittances to Calcutta should be addressed to the TREASURER BENGAL SECRETARIAT *Writers Buildings Calcutta*

## PARTS OUT OF STOCK AND DUPLICATE COPIES

WHEN a request on is received for any set of the reports and any Parts are out of stock the following deduction from the foregoing rates is made for such Parts —

| | Without postage | With Indian postage |
|---|---|---|
| | Rs a. p | Rs. a. p |
| CALCUTTA SERIES | | |
| All Parts for one year | 7 2 6 | 8 6 3 |
| Any one Part | 0 8 9 | 0 10 3 |
| MADRAS BOMBAY OR ALLAHABAD SERIES— | | |
| All Parts for one year | 4 4 6 | 4 11 3 |
| Any one Part | 0 5 3 | 0 5 3 |

If any Part is lost in transit to a subscriber and the fact is reported to the office of distribution within three months from the date of publication, a duplicate will be supplied at the following rate —

| | Without postage | With Indian postage |
|---|---|---|
| | Rs a. p | Rs a. p |
| CALCUTTA SERIES | 0 8 9 | 0 10 3 |
| MADRAS BOMBAY OR ALLAHABAD SERIES | 0 5 3 | 0 5 9 |

## REPRINTS

THE Complete Series for the years 1878 1879 1880 1882 1884, 1888, 1890 1891 1895 1896 1897 1899 1900 1901 and 1904 to 1909 has been reprinted and may be purchased at the Bengal Secretariat Book Dépôt Calcutta either wholly or in part. All parts required to complete the stock of the Reports for other years are now being reprinted. *Complete Reports from the beginning to date* will therefore shortly be available at the Bengal Secretariat Book Dépôt

## ADVERTISEMENTS FOR THE CALCUTTA SERIES

ADVERTISEMENTS of law publications only are received. Rates can be ascertained on application to the Bengal Secretariat Book Dépôt

# THE BENGAL LAW REPORTS.

SEVERAL volumes of the Bengal Law Reports from August 1868 to December *1875* and Full Bench Rulings Parts I and II are available at the Bengal Secretariat Book Dépôt, Calcutta at the following rates —

| | Without postage | With Indian postage |
|---|---|---|
| | Rs. a. p. | Rs a p |
| BENGAL LAW REPORTS for one year | 20 0 0 | 22 8 0 |
| Single copies each | 2 0 0 | 2 0 0 |
| FULL BENCH RULINGS Parts I and II | 20 0 0 | 22 8 0 |

body A custom in favour of the brothers or other near relatives of the vendor, might be an instance" He proceeds — "Again when a Settlement Officer records a custom of pre emption in the wajib ul-arz of a new mahal created by perfect partition of an old one, what is that custom? It cannot be something absolutely new, or the word custom would be a misnomer It must therefore be something which existed before the new mahal and before the partition, something therefore which existed in the time of the old mahal, which has survived the partition, and which is recognised as still applicable within the new mahal" From this language we gather that the view of the learned Chief Justice was that in each particular case the court is to see whether the custom recorded is one which necessarily pre supposes the continuance of the old co parcenary body, and that if it does pre suppose the continuance of that body the custom can no longer prevail, but must perish upon perfect partition Later on, after referring to the decision in *Abdul Hai* v *Nain Singh* (1) to the effect that it would require very strong evidence to satisfy the court that after share holders in a mahal had applied for and obtained partition and consequent separation of their interest from other share holders in the mahal, they intended that the other co-sharers from whom they had separated their interest should be entitled to come in and pre empt in the new mahal and become again their co sharers, the learned Chief Justice observes —"Some of these considerations obviously do not apply where the right is claimed after partition by persons who, having been co sharers in the undivided mahal, are still co sharers with the vendor in one of the separate mahals Partition has not as regards them made so radical a change, they are as closely united as before, though by a new bond, there is still the distinction between them and strangers which it is the object of pre emption to preserve" If by the passage last quoted the learned Chief Justice intended to convey that a custom whereby a sharer in a village is entitled to pre-empt a sale to a stranger only prevails upon partition of the village into several mahals so far as to allow of a right of pre emption in the case of a sale of part of a mahal in which the pre-emptor is a co sharer

(1) (1897) I L R, 20 All., 9?

The Bombay Code, Vol I, Third Edition, 1907 ... ... ... Rs 4. (8 a.)
Ditto Vol. II, Third Edition, 1907 ... ... . Rs 6 (8 a.)
Ditto Vol. III, Third Edition, 1908 ... ... ... Rs 5 (8 a)
Ditto Vol IV Third Edition, 1909 ... .. Rs 4 (8 a)
Volumes I to IV. Reduced to Rs 11 per set.
The Coorg Code, Third Edition, 1908. ... ... ... ... Rs. 2 (4 a.)
E B & Assam Code, Vol I, Edition 1907 ... ... .. Rs 6 (10 a)
Ditto Vol II, Edition 1907 ... ... .. Rs 6 (9 a)
Ditto Vol III, Edition 1907 ... .. ... Rs 6 (9 a)
Volumes I to III reduced to . .. .. .. Rs 16 (per set)
The United Provinces Code, Volume I, Fourth Edition, 1906, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table .. . Rs 5 (8 a)
The United Provinces Code, Vol II, Fourth Edition, 1906, consisting of the Acts of the Lieutenant-Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in, or extended to, the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874, with an Index. Rs 10 (Re. 1) for both Vols or Rs 5, (8 a) for each Volume
The United Provinces Code, Vols I and II, reduced to Rs. 7 per set

*In the Press*

A Digest of Indian Law Cases, 1908, by C E Grey, Barrister at-Law
A new edition of the Burma Code

## II—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION

Act I of 1846 (Legal Practitioners), as modified up to 1st October, 1907 2 a (1 a)
Act XXXVII of 1850 (Public Servants Inquiries), as modified up to 1st August, 1908 . 11 a (1 a)
Act XXX of 1852 (Naturalization of Aliens), as modified up to 30th April 1908 ... .. .. 2 a (1 a)
Act XX of 1853 (Legal Practitioners), as modified up to 1st September, 1907 .. .. .. ... 1 a 9 p (1 a)
Act XXIII of 1855 (Administration of mortgaged Estates), as modified up to 1st October 1908 .. ... .. ... 1 a 3 p (1 a)
Act XXIV of 1856 (Penal Servitude), as modified up to 1st January, 1909, 2 a (1 a)
Act XIII of 1857 (Opium), as modified up to 1st August, 1908 . 4 a 3 p (1 a)
Act IX of 1859 (Forfeiture), as modified up to 1st October 1908 . 1 a 9 p (1 a)
Act XXIV of 1859 (Madras District Police), as modified up to 1st November, 1907 .. ... ... .. 3 a 6 p (2 a)
Act XVI of 1863 (Excise Duty on Spirits), as modified up to 1st October, 1908 .. 2 a (1 a)
Act XXXI of 1863 (Gazette of India) with footnotes . 1 a 3 p (1 a)
Act X of 1865 (Succession), as modified up to 1st April 1909 Rs 1 8 (2 a)
Act XXII of 1867 (Sarais and Parraos), as modified up to 1st August 1908 ... .. .. .. 2 a (1 a)
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907 ... .. .. 5 a (1 a)
Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1909 .. 1 a 1-2 (3 a)
Act VI of 1870 (Unclaimed Deposits) as modified up to 1st October, 1909 1 a (1 a)
Act VII of 1870 (Court Fees) as modified up to 1st February 1909 .. 1 a 1 (1 a)
Act XXVII of 1871 (Criminal Tribes), as modified up to 1st October, 1908 ... ... ... ... .. 5 a 6 p (1 a 6 p)

*claim pre-emption who is not a co parcener of the vendor, it is in my opinion too widely expressed"* (the italics are mine) It is clear from this that the Chief Justice did not consider that in every case the claimant for pre emption after partition must be a co sharer with the vendor in the mahal in which the vendor has a share

Referring to the case of *Gokal Singh* v *Mannu Lal* (1) which was a case of pre emption arising out of a contract, which gave the right of pre emption to persons described in the report as "share holders" or "partners" in the village, he observed.—"It appears to me that the whole question was whether the plaintiffs when they brought their suit were co sharers of the village within the meaning of the contract That depended on whether the pre emption clause meant by co sharers of the village all persons owning shares within any part of the village area, or all whose shares were co extensive with the whole of that area, or all who, whether in the whole or in part of the village were co-sharers of the vendor If it had the first meaning, then the plaintiffs, being co-sharers of one of the mahals into which the village was divided, were entitled to pre emption"

It will be observed that the Chief Justice here recognizes that the expression *hissadaran deh* was susceptible of the meaning that it embraced "all persons owning shares within any part of the village area" Subsequently in his judgement the learned Chief Justice quoted without disapproval the case of *Abbas Ali* v *Ghulam Nabi* (2) in which Knox, J, held that the partition of a village consisting of a single mahal into two separate mahals in one of which the plaintiff and the vendor were co-sharers and in the other the vendee was a co sharer, did not render the previously framed wajib ul arz inapplicable, and that under it the vendee was equally entitled with the plaintiff as a co sharer of the vendor

He also cited the case of *Mata Din* v *Mahesh Prasad* (3). In that case there was a village originally forming a single mahal, and the wajib ul-arz of which gave a right of pre-emption to *hissadaran*, not of the mahal but of the mauza There was a perfect partition of the village into three mahals, for each of which a new wajib-ul-arz was framed and in each the

(1) (1885) I L R 7 All. 772 (2) Weekly Notes 1891, p 137
(3) Weekly Notes, 1892, p 100

Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February, 1908 ... ... ... ... ... ... In Nagri 9 p. (1 a.)

Act I of 1906 [Indian Tariff (Amendment)] ... ... ... In Urdu. 3 p (1 a)

Ditto ditto ... In Nagri, 3 p (1 a)

Act III of 1906 (Coinage) ... ... ... ... In Urdu 9 p. (1 a)

Ditto ditto ... ... In Nagri. 9 p. (1 a)

Act V of 1906 (Stamp Amendment) ... ... ... ... In Urdu. 3 p (1 a)

Ditto ditto ... ... In Nagri. 3 p (1 a)

Act III of 1907 (Provincial Insolvency) ... ... ... In Urdu. 1 a 6 p (1 a)

Ditto ditto ... ... In Nagri. 1 a 6 p (1 a)

Act IV of 1907 [Repealing and Amending (Rates and Cesses)] ... In Urdu. 3 p. (1 a)

Ditto ditto ... ... In Nagri. 3 p. (1 a)

Act V of 1907 (Local Authorities Loan) ... ... ... In Urdu. 3 p (1 a)

Ditto ditto ... ... In Nagri 3 p. (1 a)

Act VI of 1907 (Prevention of Seditious Meetings). ... ... In Urdu. 3 p. (1 a)

Ditto ditto ... ... In Nagri. 3 p. (1 a)

Act I of 1908 (Legal Practitioners) ... ... ... ... In Urdu. 3 p. (1 a.)

Ditto ditto ... ... In Nagri. 3 p (1 a.)

Act II of 1908 (Tariff) ... ... ... ... ... In Urdu. 3 p. (1 a)

Ditto ditto ... ... In Nagri 3 p. (1 a)

Act V of 1908 (Code of Civil Procedure) ... ... ... In Urdu. Re 1 2 a. (6 a

Ditto ditto ... ... In Nagri Re. 1 2 a (6

Act VI of 1908 (Explosive Substances) ... ... ... In Urdu. 3 p (1 a)

Ditto ditto ... ... In Nagri. 3 p (1 a)

Act VII of 1908 (Incitements to offences) ... ... ... In Urdu. 3 p. (1 a.)

Ditto ditto ... ... In Nagri 3 p. (1 a)

Act IX of 1908 (Limitation) ... ... ... ... In Urdu. 2 a (1 a)

Ditto ditto ... ... In Nagri 2 a (1 a)

Act X of 1908 (Salt Duties) ... ... ... ... In Urdu 3 p. (1 a)

Ditto ditto ... ... In Nagri 3 p (1 a)

Act XI of 1908 (Assam Labour and Emigration) ... ... In Urdu. 3 p. (1 a)

Ditto ditto ... ... In Nagri. 3 p. (1 a.)

## V.—MISCELLANEOUS PUBLICATIONS

Table showing Effect of Legislation in the Governor General's Council during 1906 ... ... ... ... ... 3 a 6 p. (1 a.)

Ditto ditto during 1907 2 a 6 p (1 a)

Ditto ditto during 1908 4 a (1 a)

Annual Indexes to the Acts of the Governor General of India in Council for 1906 and 1907. The price is noted on them.

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date. Super-royal 4to. Annual subscription Rs 5 (Re 1); single issue 4a, including postage.

Addenda and Corrigenda List No I of 1906 to the List of General Rules and Orders ... ... ... ... ... 3 p. (1 a)

Ditto ditto No II of 1906. ... 1 a. 9 p. (1 a.)

Ditto ditto No. I of 1907. ... 3 p (1 a)

Ditto ditto No. II of 1907 ... 1 a. (1 a)

Ditto ditto No I of 1908. ... 1 a 6 p. (1 a)

Ditto ditto No II of 1908 ... 2 a 9 p (1 a).

A Digest of Indian Law Cases, containing the High Court Reports and Privy Council Reports of Appeals from India, 1901-03, with an Index of cases, compiled under the orders of the Government of India, by F. G. Wigley, of the Inner Temple, Barrister-Law, Edition 1905. Rs. 10. Reduced to Rs. 5 per copy ... ... ... (10 a)

*claim pre emption who is not a co parcener of the vendor, it is in my opinion too widely expressed"* (the italics are mine) It is clear from this that the Chief Justice did not consider that in every case the claimant for pre emption after partition must be a co sharer with the vendor in the mahal in which the vendor has a share

Referring to the case of *Gokul Singh* v *Mannu Lal* (1) which was a case of pre emption arising out of a contract, which gave the right of pre emption to persons described in the report as "share holders" or "partners" in the village, he observed —"It appears to me that the whole question was whether the plaintiffs when they brought their suit were co sharers of the village within the meaning of the contract That depended on whether the pre emption clause meant by co sharers of the village all persons owning shares within any part of the village area, or all whose shares were co extensive with the whole of that area, or all who, whether in the whole or in part of the village were co sharers of the vendor If it had the first meaning, then the plaintiffs, being co sharers of one of the mahals into which the village was divided, were entitled to pre emption "

It will be observed that the Chief Justice here recognizes that the expression *hissadaran deh* was susceptible of the meaning that it embraced "all persons owning shares within any part of the village area" Subsequently in his judgement the learned Chief Justice quoted without disapproval the case of *Abbas Ali* v *Ghulam Nabi* (2) in which Knox, J, held that the partition of a village consisting of a single mahal into two separate mahals in one of which the plaintiff and the vendor were co-sharers and in the other the vendee was a co sharer, did not render the previously framed wajib ul arz inapplicable and that under it the vendee was equally entitled with the plaintiff as a co sharer of the vendor

He also cited the case of *Mata Din* v *Mahesh Prasad* (3) In that case there was a village originally forming a single mahal, and the wajib ul arz of which gave a right of pre-emption to *hissadaran* not of the mahal but of the mauza There was a perfect partition of the village into three mahals, for each of which a new wajib ul-arz was framed and in each the

(1) (1885) I L R 7 All 772 (2) Weekly Notes 1891 p 137
(3) Weekly Notes, 1892, p 100

# List of Books and Publications for sale which are more than two years old.

## LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the office of the Superintendent of Government Printing, India, No 8 Hastings Street, Calcutta ]

THE PRICES OF THE GENERAL ACTS, LOCAL CODES, MERCHANT SHIPPING DIGEST AND INDEX TO ENACTMENTS HAVE BEEN CONSIDERABLY REDUCED

### I.—THE INDIAN STATUTE BOOK

REVISED EDITION

*Super royal 8vo cloth lettered*

### A —STATUTES

| | | |
|---|---|---|
| A Collection of Statutes relating to India, Volume I, containing the Statutes up to the end of 1890 Edition 1899 ... | Rs 6 | (10 a) |
| A Collection of Statutes relating to India, Volume II, containing the Statutes from 1891 to 1898 Edition 1900 .. | Rs. 8 | (10 a) |

### C —LOCAL CODES

| | | |
|---|---|---|
| The Ajmer Code Third Edition, 1905, containing the enactments in force in Ajmer Merwara, with an Appendix consisting of a list of the Enactments which have been declared in force in, or extended to Ajmer-Merwara by notification under the Scheduled Districts Act, 1874; a Chronological Table and an Index ... | Re 2 8 | (7 a) |
| The Baluchistan Code, Edition 1900, containing the local enactments in force in British Baluchistan and the Agency territories, with Chronological Tables and an Index ... | Rs 5 | (10 a) |
| The Burma Code Edition 1899 ... | Rs. 5 | (9 a) |
| The Central Provinces Code, Third Edition, 1904, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the Central Provinces, with an Appendix containing a list of the Acts which have been applied to the Scheduled Districts of the Central Provinces by notification under the Scheduled Districts Act, 1874, and an Index ... | Rs 4 | (6 a) |
| The Madras Code, Vols I and II Edition 1902 Rs 12. Reduced to | Rs 8 | (Re 1) |
| The Punjab and North-West Code, Edition 1903, consisting of the unrepealed enactments locally in force in the Punjab and the North-West Frontier Province with Appendix and Index .. | Rs 6 | (10 a) |

### II —REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION.

| | | |
|---|---|---|
| Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1898 (with footnotes brought down to 1st December 1901) | 7 a | (1 a) |
| Act XX of 1847 (Copyright), as modified up to 1st December, 1903 .. | 5 a | (1 a) |
| Act XVIII of 1850 (Judicial Officers' Protection) with footnotes .. | 1 a 9 p | (1 a) |
| Act XIX of 1850 (Apprentices), as modified up to 1st May, 1905 .. | 3 a 6 p | (1 a) |
| Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903 | 2 a 6 p | (1 a) |
| Act VIII of 1851 (Tolls on Roads and Bridges), as modified up to 1st June, 1897 ... | 2 a 6 p | (1 a) |
| Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904 ... | 1 a | (1 a) |
| Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903 ... | 2 a | (1 a) |

part of the village, the decision was right If it meant all persons who were co sharers in the entire undivided village for which the wajib ul arz was framed, the decision was wrong, for the plaintiffs after the partition were no more co sharers of the village in that sense than the defendant vendee As a matter of fact the only co sharers in the village at the time when the wajib ul arz was framed were co sharers of the undivided village"

Then he refers to the question before the Full Bench, namely, whether the plaintiff was a *hissadar deh* within the fourth category of pre emptors, and dealing with the contention that "*hissadar*" did not in the wajib ul-arz in question mean a co-sharer of a mahal in the sense in which that term is used in the Land Revenue Act, but merely 'the holder of a share,' he observes —"According to this argument a *hissadar deh* merely means one who owns or holds a share within the area of the village If that is the meaning then, notwithstanding the partition, the plaintiff is entitled to pre emption, for the *deh* or village still remains and he is still a *hissadar*, or owner of a share within its area" On the other hand, he observed —"If *hissadar* means not merely the owner of a share but a co sharer, and *hissadar deh* means a co sharer of the entire village for which the wajib ul arz was framed, then, as the effect of the perfect partition was to destroy the class of *hissadaran deh* altogether, neither the plaintiff nor anyone else can now claim pre emption as a member of it" Then he explains that the word *hissadar* used in the wajib ul arz under consideration by the court "ought to be construed in the same sense as the same word in the opening words of the clause," namely, 'if any *hissadar* wishes to transfer his share—*apna hissa*" In view of the fact that the word *hissadar* is there used without the word *deh,* he was of opinion that *hissadar* meant a co sharer and not merely a sharer in the village No such qualifying words are to be found in the wajib ul arz before us Mr Justice Aikman in his judgment in *Dalganjan Singh's* case pointed out that the claim of the plaintiff was based on the clause in the wajib ul arz which occurs in a chapter dealing with the rights of co sharers *among themselves* I gather from the language of the learned Chief Justice that his view was that in the case of a right of pre emption

Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st August 1897 ... 10 *a.* (1 *a.*)

Act II of 1882 (Trusts), as modified up to 1st June, 1903 ... 10 *a.* (1 *a.*)

Act IV of 1882 (Transfer of Property), as modified up to 1st December, 1905 ... 15 *a.* (1 *a.*)

Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891). ... 8 *a.* (1 *a.*)

Act VI of 1882 (Companies), as modified up to 1st August, 1906 ... Rs. 1-10 *a.* (3 *a.*)

Act XII of 1882 (Salt), as modified up to 1st December, 1890 ... 6 *a.* (1 *a*)

Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1906 ... 10 *a.* (2 *a.*)

Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December 1904 ... 6 *a.* (1 *a.*)

Act VIII of 1883 (Little Cocos and Preparis Islands Laws), as modified up to 1st October, 1903 ... 1 *a.* 3 *p.* (1 *a.*)

Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ... 2 *a.* 6 *p.* (1 *a*)

Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July, 1891 ... 9 *a.* (2 *a.*)

Act VII of 1884 (Steam-ships), as modified up to 1st July, 1890 ... 6 *a.* (1 *a.*)

Act XII of 1884 (Agriculturists' Loans), as modified up to 1st February, 1903 2 *a.* (1 *a*)

Act XVIII of 1884 (Punjab Courts), as modified up to 1st December 1899 ... 7 *a.* (1 *a.*)

Act XIII of 1885 (Indian Telegraph), as modified up to 1st March, 1905 ... 5 *a.* (1 *a*)

Act II of 1886 (Income-tax), as modified up to 1st April, 1903 ... 3 *a.* (1 *a.* 6 *p*)

Act VI of 1886 (Births, Deaths and Marriages Registration, as modified up to 1st June, 1891 ... 6 *a.* (1 *a.*)

Act XI of 1886 (Tramways), as modified up to 1st December, 1903 ... 9 *a.* (2 *a.*)

Act XIII of 1886 (Securities), as amended by Act XII of 1891 ... 2 *a.* 9 *p.* (1 *a*)

Act VII of 1887 (Suits Valuation), as modified up to 1st October, 1904 ... 1 *a.* 9 *p.* (1 *a.*)

Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December, 1900 ... 6 *a.* (1 *a.*)

Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1899 ... 8 *a* (1 *a*)

Act V of 1888 (Inventions and Designs), as modified up to 1st July 1903 ... 9 *a* (2 *a*)

Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904 ... 1 *a.* 9 *p.* (1 *a.*)

Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903 ... 5 *a.* 6 *p.* (1 *a*)

Act XIII of 1889 (Cantonments) as modified up to 1st March, 1895 ... 7 *a.* (1 *a.*)

Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 ... 3 *a.* (1 *a*)

Act IX of 1890 (Railways), as modified up to 1st June, 1905, with an Index ... Rs. 1-2. (2 *a*)

Act X of 1890 (Press and Registration of Books), as modified up to 1st December, 1903 ... 2 *a.* 3 *p.* (1 *a.*)

Act XII of 1891 (Repealing and Amending Act), showing the Schedules as modified up to 31st May, 1902 ... 12 *a.* (1 *a.* 6 *p*)

Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 ... 1 *a.* 3 *p.* (1 *a.*)

Act I of 1894 (Land Acquisition), with footnotes ... 7 *a.* (1 *a.*)

Act VIII of 1894 (Tariff), as modified up to 1st February, 1906 ... 9 *a.* (2 *a*)

Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898 ... 7 *a.* 6 *p.* (1 *a* 6 *p.*)

Act XII of 1896 (Excise), as modified up to 1st March, 1907 ... 8 *a.* (2 *a*)

Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... 1 *a.* 6 *p.* (1 *a*)

Act V of 1898 (Code of Criminal Procedure as modified), up to 1st April, 1903 ... Rs. 3-10. (8 *a.*)

Act II of 1899 (Stamps), as modified up to 1st March, 1907 ... Re. 1. (2 *a.*)

Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of [illegible] ... 1 *a.* (1 *a*)

Act III of 1900 (Prisoners), as modified up to 1st March, 1905 ... 6 *a* 6 *p.* (1 *a.*)

Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ... 5 *a.* 6 *p.* (1 *a*)

unless he was also a co sharer My brother Banerji repelled this contention, observing that such a construction could only be justified by reading into the wajib ul-arz words which did not appear in it "Under that document," he observed, "pre-emptors of the first class are near relatives without any qualification, and pre emptors of the second class are co sharers in the village If the intention had been that pre emptors of the first class must also be co sharers, nothing could have been easier than to insert appropriate words to indicate that intention As the wajib ul-arz is worded, it is only near relatives, whether they are co sharers or not, who come under the category of pre emptors of the first class" This case is an illustration of a custom whereby a party enjoys a right to pre empt who is not a co sharer with the vendor or a sharer at all in a village Why should not the same considerations apply to the case of a *hissadar karib*, that is, a relative who is a sharer in the village? If a common bond is found in the one case in relationship, why, I ask, should not in the other a common bond be found in membership of the village community coupled with relationship? Why should the additional condition be imposed, namely, that the pre emptor must be a co sharer with the vendor?

In the case of *Auseri Lal* v *Ram Bhajan Lal* (1), in which, on partition of a village into two separate mahals, the provisions of the former wajib ul arz, which recorded a custom of pre emption as existing in favour of, amongst others, sharers in the village (*hissadar deh*), were copied *verbatim* into the wajib ul-arz of each of the new mahals, it was held by Justice Sir William Burkitt and myself that a co sharer in the village was entitled to pre empt a sale of property situate in one of the new mahals in which he had no share Sir William Burkitt was a member of the Bench which decided *Dalganjan Singh's* case

Now let us see what is the language in which the custom in the case before us is set forth in the wajib-ul arz The custom is that if a sharer (*hissadar*) wishes to sell his *haqiat*, then he shall do so, first, to a near sharer (*hissadar karib*), and if he shall refuse, then to another sharer in the village (*dusre hissadar deh*)

(1) (1905) I L R, 27 All, 602.

| | |
|---|---|
| Act V of 1861 (Police), as modified up to 7th March, 1903 .. ... | In Urdu 2 a 9 p (1 a) |
| Ditto ditto ... | In Nagri 2 a 9 p (1 a) |
| Act XVI of 1861 (Stage carriages), as modified up to 1st February, 1898 | In Urdu 1 a 3 p (1 a) |
| Ditto ditto .. | In Nagri, 1 a 3 p (1 a) |
| Act III of 1864 (Foreigners), as modified up to 1st September, 1906 ... | In Urdu 1 a (1 a) |
| Ditto ditto ... | In Nagri 1 a (1 a) |
| Act III of 1865 (Carriers), as modified up to 31st May, 1903 . .. | In Urdu. 9 p (1 a) |
| Ditto ditto .. ... | In Nagri 9 p (1 a) |
| Act III of 1867 (Gambling), as modified up to 1st December, 1896 .. | In Nagri 1 a 3 p (1 a) |
| Ditto ditto 1st January, 1905 | In Urdu 1 a (1 a) |
| Act V 1869 (Indian Articles of War) as modified up to 1st January, 1895 . . | In English Urdu and Nagri Bound Rs 3 (5 a) |
| Ditto ditto .. | Unbound Rs 2 8 (5 a) |
| Act VII of 1870 (Court fees), as modified to 1st December, 1896 | In Urdu 8 a 3 p (2 a 6 p) |
| Ditto 1st October 1899 ... | In Nagri 8 a 9 p (1 a) |
| Act I of 1871 (Cattle trespass), as modified up to 1st December, 1903 ... | In Urdu 1 a 9 p (1 a) |
| Ditto ditto ... | In Nagri 1 a 9 p (1 a) |
| Act XXIII of 1871 (Pensions) . ... . | In Urdu, 9 p (1 a) |
| Ditto ... .. ... .. | In Nagri. 9 p (1 a) |
| Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904 ... | In Urdu 2 a 6 p (1 a 6 p) |
| Act IX of 1872 (Contract) as modified up to 1st September, 1899 ... | In Urdu 9 a 9 p (3 a) |
| Ditto ditto .. | In Nagri 9 a 6 p (3 a) |
| Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 .. | In Urdu 4 a (2 a) |
| Ditto ditto | In Nagri 4 a (2 a) |
| Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903 ... .. .. ... . .. | In Urdu. 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1899 .. ... .. .. | In Urdu 3 a 3 p (1 a) |
| Ditto ditto ... | In Nagri 3 a 3 p (1 a) |
| Act X of 1873 (Oaths), as modified up to 1st February 1903 ... .. | In Urdu 1 a (1 a) |
| Ditto ditto .. ... | In Nagri 9 p (1 a) |
| Act XVI of 1873 (Village and Road Police, United Provinces) | In Urdu 1 a (1 a) |
| Act IX of 1874 (European Vagrancy) . .. | In Urdu 2 a (1 a) |
| Act IX of 1875 (Majority), as modified up to 1st May, 1906 ... .. | In Urdu 3 p (1 a) |
| Ditto ditto ... ... | In Nagri 3 p (1 a) |
| Act XI of 1876 (Presidency Banks) as modified up to 1st March, 1906 | In Urdu 3 a 9 p (1 a 6 p) |
| Ditto ditto .. | In Nagri 3 a 6 p (1 a 6 p) |
| Act XVIII of 1876 (Oudh Laws) .. ... ... ... | In Urdu 2 a (1 a) |
| Act I of 1877 (Specific Relief) as modified up to 1st February, 1904 | In Urdu 4 a 6 p (1 a 6 p) |
| Ditto ditto . | In Nagri. 4 a 6 p (1 a 6 p) |
| Act I of 1878 (Opium), as modified up to 1st December, 1896 .. .. | In Nagri. 1 a 6 p (1 a) |
| Act VII of 1878 (Forests), as modified up to 1st December, 1903 .. | In Urdu 4 a (1 a 6 p) |
| Ditto ditto ... | In Nagri. 4 a (1 a 6 p) |
| Act XI of 1878 (Arms), as modified up to 1st May, 1901 ... | In Urdu 2 a (1 a) |
| Ditto ditto . .. | In Nagri 2 a (1 a) |
| Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902 ... .. . .. | In Urdu 2 a (1 a) |
| Ditto ditto .. | In Nagri 2 a (1 a) |
| Act XVIII of 1879 (Legal Practitioners) as modified up to 1st May 1896 | In Urdu 2 a 6 p (1 a) |
| Ditto ditto | In Nagri 2 a 6 p (1 a) |

altering and modifying the custom It appears to me therefore that the custom must prevail in its entirety or not at all Now the custom in this case is not one, in my opinion, which necessarily pre supposes the continuance of the village as an undivided village—no more than did the custom which was the subject of consideration in the case of *Ram Din* v *Pokhar Singh* The object of a custom of pre emption is to exclude strangers from participation in the ownership of a village or other area There is no reason why a custom such as that which is recorded in the wajib-ul arz in the present case should be treated as extinguished upon partition of the village into separate mahals The sharers in each of the new mahals continue to be sharers in the village, and there is still the common bond between them that they are sharers in the village

The learned Judge from whose decision this appeal has been preferred, in overruling the decision of both the lower courts stated that the case was exactly on all fours with the case of *Dalganjan Singh* v *Kalka Singh* I think that I have shown that this is not so, in view of the fact that there is to be found in the wajib-ul arz in that case language which qualified the meaning of the expression *hissadaran deh* The question before us nearly resembles that which was decided by my brother the late Sir William Burkitt and myself in *Auseri Lal* v *Ram Bhajan Lal* The learned Judge does not allude to that decision, but he quotes the following passage from a judgment which I delivered in *Gobind Ram* v *Masih ullah Khan* (1) —"As was remarked," he observed, in that case, "the custom which prevailed in this case was one which gave a right of pre emption to persons between whom there was the common bond that they each owned a share of an undivided village, and when this common bond was severed by partition the custom ceased to be applicable" This is not a complete quotation The important words which introduced the words quoted by the learned Judge are omitted by him. These words are "It may be said that" and the passage coupled with the succeeding passage in the judgment was intended to show that the plaintiff was on the horns of a dilemma, namely, that if he contended that the custom which

(1) (1909) I L R 29 All 295.

| | | |
|---|---|---|
| Act VI of 1888 (Debtors) ... ... ... ... ... | In Urdu | 6 p (1 a) |
| Ditto ... . . ... | In Nagri | 6 p (1 a) |
| Act I of 1889 (Metal Tokens), as modified up to 1st April 1904 ... | In Urdu | 6 p (1 a) |
| Ditto ditto .. | In Nagri | 6 p (1 a) |
| Act II of 1889 (Measures of Length) . . . . | In Urdu | 3 p (1 a) |
| Ditto . ... .. ... | In Nagri | 3 p (1 a) |
| Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904 ... . .. .. ... | In Urdu | 1 a 9 p (1 a) |
| Ditto ditto ... | In Nagri | 2 a (1 a) |
| Act VI of 1889 (Probate and Administration) .. ... | In Urdu | 6 p (1 a) |
| Ditto ... .. .. | In Nagri | 6 p (1 a) |
| Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903 ... ... | In Urdu | 1 a 9 p (1 a) |
| Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 | In Nagri. | 3 a (1 a 9 p) |
| Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 ... | In Urdu | 9 p (1 a) |
| Ditto ditto ... | In Nagri | 9 p (1 a) |
| Act XVI of 1889 (Central Provinces Land Revenue) .. . | In Urdu | 1 a 6 p (1 a) |
| Ditto ditto ... .. | In Nagri | 1 a 6 p (1 a) |
| Act XX of 1889 (Lunatic Asylums Amendment) ... ... . | In Urdu | 3 p (1 a) |
| Act I of 1890 (Revenue Recovery) .. ... | In Urdu | 3 p (1 a) |
| Act II of 1890 (Amending Acts XVII of 1864 X of 1865, II of 1874 and V of 1881) . ... .. | In Urdu | (3 p) (1 a) |
| Act V of 1890 (Indian Forest and Burma Forest Amendment) .. | In Urdu | (6 p) (1 a) |
| Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1903 . ... ... . | In Urdu | 6 p (1 a) |
| Act VIII of 1890 (Guardians and Wards) .. ... ... | In Urdu | 2 a 3 p (1 a 9 p) |
| Act IX of 1890 (Railways), as modified up to 1st June, 1905 ... . | In Urdu | 8 a (2 a) |
| Ditto as modified up to 1st May 1896 ... . | In Nagri | 8 a (2 a) |
| Act X of 1890 (Press and Registration of Books Amendment) .. | In Urdu | 3 p (1 a) |
| Act XI of 1890 (Prevention of Cruelty to Animals) ... . | In Urdu | 6 p (1 a) |
| Act XIX of 1890 (Salt Amendment) ... .. | In Urdu | 3 p (1 a) |
| Act XX of 1890 (North Western Provinces and Oudh) ... .. | In Urdu | 1 a (1 a) |
| Act X of 1891 (Indian Criminal Law Amendment) ... .. | In Urdu | 3 p (1 a) |
| Act XIV of 1891 (Oudh Courts) . . ... . | In Urdu | 6 p (1 a) |
| Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1898 and XII of 1900 . . ... . | In Urdu | 3 p (1 a) |
| Ditto ditto .. | In Nagri | 6 p (1 a) |
| Act II of 1892 (Christian Marriage Validation) ... . | In Urdu | 3 p (1 a) |
| Act IV of 1892 (Bengal Court of Wards Amendment) . | In Urdu | 6 p (1 p) |
| Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) . | In Urdu | 3 p (1 a) |
| Act IV of 1893 (Partition) ... .. ... . | In Urdu | 3 p (1 a) |
| Act I of 1894 (Land Acquisition) ... ... ... ... | In Urdu | 2 a 3 p (1 a 6 p) |
| Ditto . | In Nagri | 1 a 6 p (1 a 6 p) |
| Act III of 1894 (Criminal Procedure and Penal Codes Amendment) . | In Urdu | 3 p (1 a) |
| Act V of 1894 (Civil Procedure Code Amendment) ... | In Urdu | 3 p (1 a) |
| Ditto ditto .. | In Nagri | 3 p (1 a) |
| Act VIII of 1894 (Tariff), as modified up to 1st October, 1903 ... | In Urdu | 4 a (1 a) |
| Ditto ditto ... | In Nagri | 3 a 9 p (2 a) |
| Act IX of 1894 (Prisons) . ... ... ... | In Urdu | 2 a 3 p (1 a.) |
| Ditto .. ... ... | In Nagri | 2 a 3 p (1 a.) |
| Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment) | In Urdu | 3 p (1 a) |
| Ditto ditto ... | In Nagri | 8 p (1 a.) |
| XII of 1895 (Companies—Memorandum of Association) ... | In Urdu. | 3 a (1 a.) |

was found which led the Court to hold that *hissadar* meant a co-sharer. In the wajib-ul-arz before us there is no such qualifying language, and we have therefore only to interpret the words *hissadar deh* according to their strict, plain, common meaning. This meaning I take to be a sharer in the village.

I would therefore allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of lower appellate court.

BANERJI, J.—I agree with Mr. Justice Aikman that this case cannot be distinguished in principle from the Full Bench decision in *Dalganjan Singh* v *Kalka Singh*. In that case the following propositions were laid down :—

(1) Where on the partition of a mahal no new wajib-ul-arz has been framed for any of the new mahals, a custom or contract of pre-emption recorded in the wajib-ul-arz before partition does not necessarily come to an end and cease to have effect and operation.

(2) The question whether or how far a contract or a custom of pre-emption recorded in the wajib-ul-arz of the undivided mahal is still in force, or who is entitled to claim the benefit of it, depends in each case upon the proper construction of the particular contract or custom. For example, if a contract of pre emption contained an express covenant to the effect that persons entitled to pre-emption would not be deprived of their right by a perfect partition of the mahal, the right would not be affected by the partition. Again, if a brother or other relative, who is not a co-sharer, has the right of pre-emption, a partition of the mahal would not affect his right. Another instance may be a case similar to that of *Janki* v. *Ram Partap* (1), where before partition a shareholder in one mahal had the right to pre-empt property situate in another mahal.

(3) There is a strong presumption against a claim for pre-emption when it is made after perfect partition by persons who are no longer co sharers of the vendor, and where the language of the wajib-ul-arz is ambiguous this presumption

(1) (1905) I. L. R., 28 All., 236.

Act VI of 1888 (Debtors) ... ... ... ... ... In Urdu 6 p (1 a)
Ditto .. ... ... .. ... In Nagri 6 p (1 a)
Act I of 1889 (Metal Tokens), as modified up to 1st April 1904 ... In Urdu 6 p (1 a)
Ditto ditto ... In Nagri 6 p (1 a)
Act II of 1889 (Measures of Length) .. ... ... ... In Urdu 3 p (1 a)
Ditto .. ... ... ... In Nagri 3 p (1 a)
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904 ... .. .. .. ... In Urdu 1 a 9 p (1 a)
Ditto ditto ... *In Nagri 2 a (1 a)*
Act VI of 1889 (Probate and Administration) .. ... ... In Urdu 6 p (1 a)
Ditto ... ... .. In Nagri 6 p (1 a)
Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903 .. ... .. ... In Urdu 1 a 9 p (1 a)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895 . In Nagri 3 a. (1 a 9 p)
Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 ... In Urdu 9 p. (1 a)
Ditto ditto ... In Nagri. 9 p (1 a)
Act XVI of 1889 (Central Provinces Land Revenue) ... .. In Urdu. 1 a 6 p (1 a)
Ditto ditto ... ... In Nagri 1 a 6 p (1 a)
Act XX of 1889 (Lunatic Asylums Amendment) ... ... ... In Urdu 3 p (1 a)
Act I of 1890 (Revenue Recovery) ... ... In Urdu 3 p (1 a)
Act II of 1890 (Amending Acts XVII of 1864, X of 1865, II of 1874 and V of 1881) ... ... ... .. *In Urdu (3 p) (1 a)*
Act V of 1890 (Indian Forest and Burma Forest Amendment) ... In Urdu *(6 p) (1 a)*
Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1903 .. ... ... In Urdu 6 p (1 a)
Act VIII of 1890 (Guardians and Wards) ... ... ... In Urdu 2 a 3 p. (1 a 9 p)
Act IX of 1890 (Railways), as modified up to 1st June, 1905 ... .. In Urdu 8 a (2 a)
Ditto as modified up to 1st May 1896 ... ... In Nagri 8 a (2 a)
Act X of 1890 (Press and Registration of Books Amendment) ... In Urdu 3 p (1 a)
*Act XI of 1890 (Prevention of Cruelty to Animals)* ... ... *In Urdu 6 p (1 a)*
Act XIX of 1890 (Salt Amendment) ... .. In Urdu 3 p (1 a)
Act XX of 1890 (North-Western Provinces and Oudh) ... .. In Urdu 1 a (1 a)
Act X of 1891 (Indian Criminal Law Amendment) .. In Urdu 3 p (1 a)
Act XIV of 1891 (Oudh Courts) .. ... ... .. In Urdu 6 p. (1 a)
Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1898 and XII of 1900 .. ... .. In Urdu 3 p (1 a)
Ditto ditto ... In Nagri 6 p (1 a)
Act II of 1892 (Christian Marriage Validation) ... ... In Urdu 3 p (1 a)
Act IV of 1892 (Bengal Court of Wards Amendment) .. In Urdu 6 p. (1 p)
Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) .. In Urdu 3 p. (1 a)
Act IV of 1893 (Partition) .. ... ... ... ... In Urdu 3 p. (1 a)
Act I of 1894 (Land Acquisition) ... ... ... ... In Urdu 2 a 3 p (1 a 6 p)
Ditto ... In Nagri 1 a 6 p. (1 a 6 p)
Act III of 1894 (Criminal Procedure and Penal Codes Amendment) .. In Urdu 3 p (1 a)
Act V of 1894 (Civil Procedure Code Amendment) ... ... In Urdu 3 p (1 a)
Ditto ditto ... In Nagri 3 p (1 a)
Act VIII of 1894 (Tariff), as modified up to 1st October, 1903 ... In Urdu 4 a (1 a)
Ditto ditto ... In Nagri 3 a 9 p (2 a)
Act IX of 1894 (Prisons) ... ... ... ... ... In Urdu 2 a 3 p (1 a)
Ditto .. ... ... ... ... In Nagri. 2 a 3 p (1 a)
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment) In Urdu 3 p (1 a)
Ditto ditto ... In Nagri 3 p (1 a)
XII of 1895 (Companies—Memorandum of Association) ... In Urdu. 3 a (1 a)

led him to come to the above conclusion is thus stated in the judgement "We are interpreting and applying a particular custom of which the plaintiff claims the benefit In considering who is entitled to the benefit of a custom it is essential to see who are the persons among whom it has in fact habitually prevailed It cannot be claimed by any one who is not a member of the class thus determined Now there can be no doubt as to what was the class of persons who at the time when the wajib-ul arz was framed habitually exercised the right of pre emption by virtue of the custom They were the co sharers of the undivided mahal which the village Sarai Sitam then formed and no others There was no distinction between shareholders in the village and co sharers of the entire village, there was only a single class of co sharers That is the only class among whom the custom actually prevailed and to whom therefore the right belonged It is now sought to apply the custom for the benefit of the plaintiff, who stands in a totally different relation to the village, to the vendor, and to the property sold He is not a co sharer of the entire village He is not a member of the class who exercised the right of pre emption at the time when the custom was recorded He is a member of a class which only came into existence through the partition, of persons who have shares in a particular sub division of the village He is not even a co sharer of the vendor To allow him to pre empt under the old wajib ul arz would be in my opinion, to change the custom while professing to apply it" It is thus clear that the basis of the learned Chief Justice's decision was not the fact that the custom of pre emption recorded in the wajib ul arz appeared in a chapter which was headed "Rights of co sharers among themselves" The other judges agreed with the learned Chief Justice In my judgement in that case I said — "In my opinion the true construction of the custom as recorded *in the wajib ul arz is that it is only such a share holder as* is also a co sharer, who has the right of pre-emption as a pre emptor of the fourth class At the time when the wajib ul arz was prepared all the share holders were also co sharers The custom which was embodied in the wajib ul arz evidently had reference to that description of share holders Therefore by

| | | | | |
|---|---|---|---|---|
| Act XII of 1899 (Currency Notes Forgery) | | In Nagri | 3 p | (1 a) |
| Act XIV of 1899 (Tariff Amendment) | | In Urdu. | 3 p | (1 a) |
| Ditto | | In Nagri | 3 p | (1 a) |
| Act XVII of 1899 (Indian Registration Amendment) | | In Urdu | 3 p | (1 a) |
| Ditto | | In Nagri | 3 p. | (1 a) |
| Act XVIII of 1899 (Land Improvement Loans Amendment) | | In Urdu | 3 p | (1 a) |
| Ditto | | In Nagri | 3 p. | (1 a) |
| Act XX of 1899 (Presidency Banks) | | In Urdu. | 3 p | (1 a) |
| Ditto | | In Nagri | 3 p | (1 a) |
| Act XXI of 1899 (Central Provinces Tenancy Amendment) | | In Urdu | 3 p | (1 a) |
| Ditto | ditto | In Nagri. | 3 p. | (1 a) |
| Act XXIV of 1899 (Central Provinces Court of Wards) | | In Urdu. | 1 a. 3 p | (1 a) |
| Ditto | ditto | In Nagri | 1 a 3 p. | (1 a) |
| Act I of 1900 (Indian Articles of War Amendment) | | In Urdu. | 3 p. | (1 a) |
| Ditto | ditto | In Nagri | 3 p | (1 a) |
| Act IV of 1900 [Indian Companies (Branch Registers)] | | In Urdu | 3 p. | (1 a) |
| Ditto | ditto | In Nagri | 3 p. | (1 a) |
| Act IX of 1900 (Amendment of Court-fees Act, 1870) | | In Urdu. | 3 p. | (1 a) |
| Ditto | ditto | In Nagri. | 3 p. | (1 a) |
| Act X of 1900 (Census) | | In Urdu. | 9 p | (1 a) |
| Ditto | | In Nagri | 9 p | (1 a) |
| Act II of 1901 [Indian Tolls (Army)] | | In Urdu | 6 p | (1 a) |
| Ditto | ditto | In Nagri | 9 p | (1 a) |
| Act V of 1901 [Indian Forest (Amendment)] | | In Urdu | 3 p | (1 a) |
| Ditto | ditto | In Nagri | 3 p | (1 a) |
| Act VI of 1901 (Assam Labour and Emigration) | | In Urdu. | 5 a | (2 a) |
| Ditto | ditto | In Nagri | 5 a | (2 a) |
| Act VII of 1901 (Native Christian Administration of Estates) | | In Urdu | 3 p | (1 a) |
| Ditto | ditto | In Nagri | 3 p | (1 a) |
| Act VIII of 1901 (Mines) | | In Urdu | 1 a. | (1 a) |
| Ditto | ditto | In Nagri. | 1 a | (1 a) |
| Act IX of 1901 | | In Urdu | 3 p | (1 a) |
| Ditto | ditto | In Nagri | 3 p | (1 a) |
| Act X of 1901 | | In Urdu | 3 p | (1 a) |
| Ditto | ditto | In Nagri | 3 p. | (1 a) |
| Act II of 1902 [Cantonments (House Accommodation) | | In Urdu | 1 a. | (1 a) |
| Ditto | ditto | In Nagri. | 1 a. | (1 a) |
| Act IV of 1902 (Indian Tramways) | | In Urdu | 3 p. | (1 a) |
| Ditto | | In Nagri | 3 p | (1 a) |
| Act V of 1902 (Administrators General and Official Trustees) | | In Urdu | 3 p | (1 a) |
| Ditto | ditto | In Nagri. | 3 p | (1 a) |
| Act VII of 1902 [United Provinces (Designation)] | | In Urdu | 3 p | (1 a) |
| Act VIII of 1902 (Indian Tariff) | | In Urdu | 3 p | (1 a) |
| Ditto | | In Nagri | 3 p. | (1 a) |
| Act II of 1903 [Indian Post Office (Amendment)] | | In Urdu. | 3 p | (1 a) |
| Ditto | | In Nagri | 3 p | (1 a) |
| Act III of 1903 (Electricity) | | In Urdu | 2 a. 6 p | (1 a 6 p) |
| Ditto | | In Nagri | 2 a. | (1 a 6 p) |
| Act VII of 1903 (Works of Defence) | | In Urdu | 1 a 3 p | (1 a) |
| Ditto | | In Nagri | 1 a 3 p | (1 a) |
| Act VIII of 1903 ([illegible] Administration) | | In Urdu | 3 p | (1 a) |
| Ditto | | In Nagri | 3 p | (1 a) |
| Act IX of 1903 (Tea Cess) | | In Urdu. | 3 p | (1 a) |
| Ditto | | In Nagri | 3 p | (1 a) |
| Act X of 1903 (Victoria Memorial) | | In Urdu. | 3 p | (1 a) |
| Ditto | | In Nagri. | 3 p | (1 a) |

*the chaupal* with its appurtenant shops is owned and possessed by the plaintiffs, the first defendant Kishan Lal, and other members of the brotherhood, and that it is not liable to sale in execution of the decree obtained by the appellant against Kishan Lal The plaintiffs state that the *chaupal* belongs to them and other members of the Lodh community that the first defendant Kishan Lal who is the *mukad lam* (i e, headman) amongst the Lodhs, had no power to mortgage it, that the decree passed upon the mortgage is calculated to deprive the plaintiffs of their right and is prejudicial to them that the plaintiffs are owners and sharers in the *chaupal* and that they are competent to sue in order to protect their rights

The defence was that the *chaupal* did not belong to the Lodh community but was the exclusive property of Kishan Lal, the mortgagor of the appellant It was also asserted that the amount of the mortgage was taken for the purpose of reconstructing the *chaupal* and that therefore the plaintiffs were liable for the said amount There was a further plea to the effect that the plaintiffs alone were not competent to maintain the suit

The court of first instance found that the *chaupal* belonged solely to the defendant Kishan Lal It was also of opinion that the plaintiffs alone could not maintain the suit, and accordingly dismissed the claim

Upon appeal by the plaintiffs, the only issue framed by the lower appellate court was whether the *chaupal* belonged to all the Lodh community The finding on that issue was in the appellant's favour, the learned Subordinate Judge being of opinion that the *chaupal* was not the exclusive property of Kishan Lal, and that it was the common property of the Lodh community In respect of the plea that section 30 of the old Code of Civil Procedure was a bar to the suit, the court below held that the section did not apply

It is contended before us in this appeal that the plaintiffs cannot maintain the suit as they did not obtain the permission of the court under section 30 of the Code of Civil Procedure, 1882, to sue on behalf of the Lodh community In our judgment this contention is not well founded Section 30 of the old Code, which corresponds to order 1, rule 8, of the present Code is an

Proceedings of the Council of the Governor General of Ind a for mak ing Laws and Regulations from July 1882 to 1905 Super royal 4to Annual subscription Rs 5 (Re 1) single issue 4 I I postage

Chronological Tables of the Indian Statutes compiled under the orders of the Government of India, by F G Wigley of the Inner Temple Ba r ster at Law Ed tion 1901 — Rs 4 (1) a

Index to Indian Statutes Chronological Tables and Index of th Ind an Statutes compiled und r the orders f the Govern e t of Ind a, by F G Wigley of the Inner Temple Barr ster at La Ed tion 1897 Two volumes — Rs 12 R luc d to R 6 (R 1)

A D gest of Ind an Law Cases conta ning High Courts Reports 1862—1900 and Privy Counc l Reports of Appeals from Ind a 1836—1900 with an Index of cases comp led under the orders of the Gove n ment of Ind a by J V Woodman of the M ddle Temple Barrister at Law and Advocate of the High Court Calcutta In s x vo lumes Super royal 8vo Rs 72 for cloth bound. Reduced to Rs 36 per set and Rs 78 for quarter bound Reduced to Rs 39 per set — (Rs 3 12)

Single volumes reduced to Rs 7 when sold separately for the first five volumes and Rs 5 for the sixth

A Digest of the Statutes and Acts relating to Merchant Shipping in India Ed tion 1884 By T A Pearson Barrister at-Law — Rs 5 Reduced to Rs 3 (12 a)

L st of General Rules and Orders under Statutes and General Acts in for e in British India corrected up to 30th June 1905 — Re 1 8 (2 a 6 p)

Adden la and Corrigenda L st No 1 of 1905 to the above — 2 a 6 p (1 a)

Index to Act V of 1869 (Indian Articles of War) as modified up to 1st January 1895 — 7 a ( a)

Ditto ditto — In Urdu and Nagri a ( a)

Contents to ditto — In Urdu and Nagri 1 a 9 p (1 a)

The Baluchistan Agency Forest Law 1890 — In Urdu 2 a (1 a p)

The Quetta Municipal Law 1896 — In Urdu 3 a 3 p (1 a 6 p)

The B luchistan Agency Criminal Justice Law, 1896 — In Urdu p (1 a)

The Baluchistan Agency Civil Justice Law, 1896 — In Urdu 2 a 6 p (1 a)

This question the Court below did not try We accordingly refer the following issues to that Court under the provisions of order 41, rule 25 of the Code of Civil Procedure —

(1) Was the mortgage in favour of the appellant made by Kishan Lál to raise money for the reconstruction of the *chaupal*

(2) If so, what powers had Kishan Lal in respect of the *chaupal* and was he competent to mortgage it for the above purpose?

The Court will take such additional evidence as may be necessary On receipt of the finding the usual ten days will be allowed for filing objections

*Issues remitted*



This question the Court below did not try We accordingly refer the following issues to that Court under the provisions of order 41, rule 25 of the Code of Civil Procedure.—

(1) Was the mortgage in favour of the appellant made by Kishan Lál to raise money for the reconstruction of the *chaupal*

(2) If so, what powers had Kishan Lal in respect of the *chaupal*, and was he competent to mortgage it for the above purpose?

The Court will take such additional evidence as may be necessary On receipt of the finding the usual ten days will be allowed for filing objections

*Issues remitted*

Registered No 422.

VOL. XXXII.] [PART VII.



# THE INDIAN LAW REPORTS.

JULY 1910.

(Pages 287—344.)

## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY.

Privy Council ... J. V. WOODMAN, *Middle Temple.*
High Court Allahabad ... W. K. PORTER, *Gray's Inn.*



ALLAHABAD.

PRINTED BY F. LUKER, SUPERINTENDENT, GOVERNMENT PRESS, AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT, UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN

Price, Re. 1.

| | |
|---|---|
| Act V of 1869 (Indian Articles of War) as modified up to 1st January 1909 | Rs 1 2 0 (3 a) |
| Act V of 1870 (Unclaimed Deposits) as modified up to 1st October 1908 ... ... | 1 a (1 a) |
| Act VII of 1870 (Court Fees) as modified up to 1st February 1909 | Rs 1 2 0 (2 a) |
| Act XXIII of 1871 (Pensions) as modified up to 1st September 1909 | 2 a 3 p (1 a) |
| Act XXVII of 1871 (Criminal Tribes) as modified up to 1st October 1908 ... | 5 a 6 p (1 a 6 p) |
| Act I of 1872 (Evidence) as modified up to 1st May 1908 | Re 1 (2 a) |
| Act IX of 1872 (Contract) as modified up to 1st February 1908 | Re 1 4 a (2 a) |
| Act IX of 1874 (European Vagrancy) as modified up to 1st September 1909 ... | 6 a 6 p (1 a) |
| Act I of 1878 (Opium) as modified up to 1st October 1907 | 5 a 6 p (1 a) |
| Act VI of 1878 (Treasure Trove) as modified by Act XII of 1891 as reprinted on the 14th February 1908 | 2 a 9 p (1 a) |
| Act VIII of 1878 (Sea Customs) as modified up to 1st June 1908 | Re 1 5 3 (4 a) |
| Act XI of 1878 (Arms) as modified up to 1st March 1910 | 6 a (1 a) |
| Act XVI of 1879 (Transport of Salt) as modified up to 1st October 1907 ... ... | 1 a 6 p (1 a) |
| Act XIII of 1880 (Vaccination) as modified up to 1st September 1909 | 4 a 9 p (1 a) |
| Act XV of 1881 (Factories) as modified up to 1st April 1910 | 5 a 6 p (1 a 6 p) |
| Act XVIII of 1881 (Central Provinces Land revenue) as modified up to 1st March 1909 | Rs 1 2 0 (3 a) |
| Act XXVI of 1881 (Negotiable Instruments) as modified up to 1st September 1909 | 10 a (1 a) |
| Act II of 1882 (Indian Trusts) as modified up to 1st June 1908 | 10 a (1 a) |
| Act XII of 1882 (Salt), as modified up to 1st August 1909 | 7 a (2 a) |
| Act V of 1883 (Indian Merchant Shipping) as modified up to 1st September 1909 ... | 6 a (1 a) |
| Act IV of 1884 (Explosives) as modified up to 1st September 1908 | 4 a (9 p) (1 a) |
| Act IX of 1884 (Legal Practitioners) as modified up to 30th June 1909 | 1 a 6 p (1 a) |
| Act III of 1888 (Police) as modified up to 1st January 1909 | 1 a 9 p (1 a) |
| Act II of 1889 (Measures of Length) with footnotes ... | 1 a 3 p (1 a) |
| Act IV of 1889 (Indian Merchandise Marks) as modified up to 1st August, 1908 ... | 6 a (1 a) |
| Act VI of 1889 (Probate and Administration) as modified up to 1st January 1909 | 2 a 9 p (1 a) |
| Act VI of 1890 (Charitable Endowments) as modified up to 1st August 1908 | 2 a 6 p (1 a) |
| Act IX of 1890 (Indian Railways) as modified up to 1st June 1909 | Re 1 2 0 (2 a) |
| Act XI of 1890 (Prevention of Cruelty to Animals) with foot notes | 2 a (1 a) |
| Act XIII of 1890 (Excise Malt Liquors) as modified up to 1st October 1908 ... | 1 a 6 p (1 a) |
| Act X of 1891 (Indian Penal Code Amendment) as modified up to 1st August 1909 ... ... | 1 a (1 a) |
| Act XII of 1895 (Indian Companies Memorandum of Association) as modified up to 1st August, 1909 ... | 2 a (1 a) |
| Act III of 1898 (Lepers) as modified up to 1st September 1909 ... | 4 a (1 a) |
| Act V of 1898 (Code of Criminal Procedure) as modified up to 1st August 1909 ... ... ... ... | Rs 3 10 a (8 a) |
| Act VIII of 1899 (Petroleum) as modified up to 1st January 1909 | [illegible] (1 a) |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February | |

From this judgment the defendants appealed under section 10 of the Letters Patent.

Babu *Sital Prasad Ghose*, for the appellants, relied on the case of *Tasadduq Husain Khan* v. *Ali Husain Khan* (1) He submitted that the interposition of the word *haq* between the words *rawaj* and *shafa* in the wajib-ul-arz in the above case did not make any real difference Moreover, there was the evidence of the patwari on the record which showed that there was a single proprietor in 1258 F; that there was no wajib-ul-arz in that year, and that the earliest wajib-ul-arz was the one upon which the suit had been brought No custom could spring up between 1258 F and 1280 F, in which year the wajib-ul-arz in question was prepared Again, there was no record of any custom of pre-emption in the *dastur dehi* of the recent settlement.

Babu *Durga Charan Banerji*, for the respondent, was not called upon

STANLEY, C J, and KNOX, J. —The solitary question before us for consideration in this Letters Patent appeal is whether or not the wajib-ul-arz, rightly construed, records a pre-existing custom of pre-emption The court of first instance decreed the claim for pre-emption as brought The Subordinate Judge reversed that decree In dealing with the question before us, which was also before him, he says that "the finding on this issue depends on the construction of the pre-emption clause in the *wajib-ul-arz* of the previous settlement, and if that clause contains a record of the custom of pre-emption, the plaintiff is certainly entitled to claim the property in dispute by right of pre-emption, but plaintiff can have no such right if the said pre-emptive clause contains simply a covenant for pre-emption, as that covenant came to an end on the expiration of the previous settlement and was not renewed in the *dastur dehi* of the present settlement" In appeal the learned Judge of this Court took into consideration the words of the wajib-ul-arz which are as follows —"*Ayanda ko jari rakhna rawaj shafa ka hamko manzur hai*" He interpreted these words as amounting to a record of the existence of a custom of pre-emption, which the co-sharers wished should continue We

(1) Weekly Notes, 1903, p. [illegible]

| | |
|---|---|
| :t VI of 1890 (Char t ble E dowments) as modified up to 1st August 1908 | In Urdu 6 p (1 a) |
| Ditto d tto .. | In Nagri 9 p (1 a) |
| : XII of 1890 (Ex s ) as mod fie l up to 1st Marcl 1907 | In Urdu 2 a 9 p (2 a) |
| D tto ditto | In Nagri 3 a 3 p (2 a) |
| :t XIII of 1899 (Gland rs an l Farcy) as modified up to 1st February 1908 .. | In Urdu 9 p (1 a) |
| Ditto d tto | In Nagri 9 p (1 a) |
| :t I of 1906 [Indian Tar ff (Amendment)] | In Urd 3 p (1 a) |
| Ditto d tto | In Nagri 3 p (1 a) |
| t III of 1906 (Co nage) | In Urdu 9 p (1 a) |
| D tto d tto | In Nagr 9 p (1 a) |
| :t V of 1906 (Stamp Amendment) .. | In Urdu 3 p (1 a) |
| Ditto l tto | In Nagri 3 p (1 a) |
| :t III of 1907 (Prov ncial Insolvency) | In Urdu 1 a 6 p (1 a) |
| D tto | In Nagri 1 a 6 p (1 a) |
| :t IV of 1907 [Repealing an l Amending (Rates and Cesses)] | In Urdu 3 p (1 a) |
| Ditto d tto | In Nagr 3 p (1 a) |
| :t V of 1907 (Local Author t es Loan) | In Urdu 3 p (1 a) |
| Ditto d tto | In Nagri 3 p (1 a) |
| :t VI of 1907 (Prevent on of Sedit ous Meet ngs) | In Urdu 3 p (1 a) |
| D tto d tto | In Nagri 3 p (1 a) |
| :t I of 1908 (Legal Practit oners) | In U du 3 p (1 a) |
| Ditto d tto | In Nagri 3 p (1 a) |
| :t II of 1908 (Ta iff) | In Urdu 3 p (1 a) |
| D tto | In Nagri 3 p (1 a) |
| t III of 1908 [Ind a Trus s An ndme t] | In Urdu 3 p (1 a) |
| : V f 1 08 (Cod of C v l Pro ed ) | In Urd Rs 1 2 (6 a) |
| D tt d tto | In Nag Rs 1 2 (6 a) |
| :t VI of 1908 (Explos ves Subst n es) | In Urdu 3 p (1 a) |
| D tto d tto | In Nag i 3 p (1 a) |
| ct VII of 1908 (Incitements to Offences) | In Urd 3 p (1 a) |
| D tto l tto | In Nagr 3 p (1 a) |
| ct IX of 1908 (L m tat on) | In Url 2 a (1 a) |
| D tto d tto | In Nagri 2 a (1 a) |
| ct X of 1908 (S lt D ties) | In Urdu 3 p (1 a) |
| Ditto | In Nagri 3 p (1 a) |
| ct XI of 1908 (Assa Labo r and Em grat on) | In Urdu 3 p (1 a) |
| D tto d tto | In Nagr 3 p (1 a) |
| ct XIV of 1908 (Ind an Cr minal Law (A n ndme t)] | In Url 3 p (1 a) |
| D tto l tto | In Nag i 3 p (1 a) |
| ct XVI of 1908 (Ind an Registration) | In Urdu 2 a (2 a) |
| D tto d tto | In Nagri 2 a (2 a) |
| ct XVII of 1908 (In lan Em grat on) .. | In Urdu 2 a 3 p (2 a) |
| D tto d tto .. | In Nagri 2 a 3 p (2 a) |
| Act I of 1909 (Ind an Steamship Law Amen l nent)] | In Urdu 3 p (1 ) |
| D tto l tto | In Nagr 3 p (1 a) |
| t IV of 1 09 (Wl pp n ) | In Urdu 3 p (1 a) |
| D tto | In Nag i 3 p (1 a) |
| t V of 1909 [Am l (Army Act)] | In Urd 3 p (1 a) |
| D tto d tto | In Nagr 3 p (1 a) |
| ct VII of 1 09 (An nd Marr age) | In Urdu 3 p (1 a) |
| D tto | |

father's life time, leaving a widow, Musammat Ishri, him surviving. Sheo Lal had a son, Narain Das, whose wife was one Musammat Amri. Ganga Dan died in 1882 or 1883, and after his death his daughter-in-law Ishri took possession of his property and held it until her death in 1899. It was found that she acquired a title by adverse possession. After the death of Musammat Ishri the property was taken possession of by Musammat Amri and one Gopal. In 1906 the present suit was brought by Kanhai Ram and Daya Ram, who claimed to be the nearest heirs of Musammat Ishri, against Amri and Gopal and various transferees from them. The court of first instance (Subordinate Judge of Aligarh) dismissed the suit upon various grounds which are detailed in the judgment of the High Court. The plaintiffs appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellants, referred to *Mohim Chunder Sanyal* v *Kashi Kant Sanyal* (1) and *Balwant Singh* v. *Ram Dei*, unreported.*

Munshi *Govind Prasad* (with him Babu *Jogindro Nath Chaudhri* and Babu *Girdhari Lal Agarwala*), for the respondents, supported the judgment of the court below.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit to recover possession of property which formerly belonged to one Ganga Dan. Ganga Dan was one of the two sons of Salig Ram, Sheo Lal being the other. Ganga Dan had a son named Khushal

---

* The judgment in this case (S. A. 411 of 1905, decided on December 7, 1906) was as follows:—

STANLEY, C. J., and KNOX, J.—In the suit out of which this appeal has arisen the plaintiff appellant Balwant Singh claimed to be entitled to the possession of a certain house which formerly belonged to his relatives Ram Chandra and Lachman. In his plaint he sets forth the death of Lachman in the year 1875, the death of Ram Chandra in the year 1876, and states that after the death of Lachman his widow Musammat Jamna Dei had been in possession and occupation of the house first jointly with Ram Chandra during his life time and subsequently with Musammat Chinti, the daughter of Ram Chandra. Then the plaint sets forth the death, childless, of Musammat Chinti in 1886, and that since that date Musammat Jamna Dei had been in exclusive possession of the house until her death on the 18th of January, 1903. The plaintiff then alleges that he is the nearest reversioner of Lachman and Ram Chandra and upon these facts he bases his claim to possession.

(1) (1897) 2 C. W. N., 161.

## NOTICE TO SUBSCRIBERS.

In order that an opportunity may be afforded of investigating the cause of the non-delivery of any Part or Parts of the "Indian Law Reports, Allahabad Series," to subscribers, it has been found necessary to give notice that no complaint can be attended to regarding the loss of any Part or Parts unless information be forwarded to the Superintendent, Government Press, Allahabad, within three months after the date of publication: after that date back numbers can be supplied only on full prepayment and not at the reduced rate of Re. 0-5-9 per copy.

The plaintiffs claiming to be the nearest reversionary heirs of Musammat Ishri instituted the suit out of which this appeal
AM has arisen for recovery of possession of the property. The court
AT below has dismissed their claim on three grounds. First of all, the court held that the suit was barred by limitation, it not having been brought within 12 years from the death of Ganga Dan. The learned Subordinate Judge was of opinion that the plaintiffs' claim was as reversionary heirs of Ganga Dan for the recovery of his property, but upon a perusal of the plaint it will be seen that their claim was not based on their heirship to Ganga Dan but on their heirship to Musammat Ishri. In the third paragraph of their plaint the plaintiffs say that they are the heirs and next reversioners of Musammat Ishri and are entitled to the possession of the property in dispute. Musammat Ishri having acquired title by adverse possession, it passed upon her death to her heirs, whoever they may be, as her *stridhan*. She died in 1899 and the present suit was instituted on the 8th of May, 1906, that is, well within the period of 12 years. The learned Subordinate Judge thinks that property acquired by a female by adverse possession is not her *stridhan* but this is contrary to the views expressed by their Lordships of the Privy Council in the case of *Brij Indar Bahadur Singh* v. *Rani Janki Koer* (1) and also contrary to the decision in *Mohim Chunder Sanyal* v. *Kashi Kant Sanyal* (2). (See also the decision of this Bench in the case of *Balwant Singh* v. *Musammat Ram Dei*, S. A. No. 414 of 1905, decided on the 7th of December, 1906, which has not been reported.* It is clear upon the authorities that property so acquired by a female is her *stridhan* and as such *stridhan* passes to her heirs.

Then the learned Subordinate Judge was of opinion that the suit was barred by section 13 of the former Code of Civil

---

learned Additional Judge for determination, namely:—"Is the plaintiff the nearest reversionary heir of Musammat Jamna Dei and as such entitled to her *stridhan* including the house in question?"

We refer this issue under the provisions of section 566 of the Code of Civil Procedure and direct that the lower appellate court shall take such additional relevant evidence as may be adduced by the parties. On return of the finding the parties will have the usual ten days for filing objections.

(1) (1877) L. R. 5 I. A. 1 S. C. 1 C. L. R. 318.

(2) (1897) 2 C. W. N. 161.

* Printed as a foot-note to this case.

# TABLE OF CASES REPORTED

defendants in proportion to his share in the village, and further claimed to recover the sum of Rs. 2,415-9-9, the amount which the defendants had wrongfully realized and converted to their own use. The fair had been established long ago jointly by the plaintiff and the defendants and was held on land which belonged jointly to them in certain proportions. The profits of the market were derived from levying a toll of so much per head upon every beast bought and sold and also from persons who were granted the privilege of putting up their stalls during the time the fair was held. The defendants admittedly had been collecting and receiving the profits derived from the fair in question. The court below, however, dismissed the suit on the ground that as there had been no sanction by the Government to the levying of the tolls and market dues, their exaction was illegal.

The plaintiff appealed and the defendants filed certain objections.

Mr. *B. E. O'Conor* (with him Munshi *Haribans Sahai*), for the appellant, contended that the cesses contemplated by the Land Revenue Act were cesses payable by a tenant to his zamindar. Here the payments were made by people who came from outside of their own free will and made use of the land. The defendants had admittedly realized the income and the plaintiff was entitled to his share, as such payments were not in the nature of cesses and did not need to be recorded. Section 56 of the Land Revenue Act contemplated cesses in the nature of rent and section 86 contemplated cesses in the nature of an impost. He cited *Sukhdeo Prasad* v. *Nihal Chand* (1), *Balwant Singh* v. *Shankar* (2), *Muhammad Abdul Hai* v. *Nathu* (3), *Ram Saran* Singh v. *Alrakh Rai* (4) and *Amir Hasan* v. *Gobind* (5).

Mr. *R. K. Sorabji*, for the respondents, submitted that the recovery of any such payments unless recorded was illegal. Sections 56 and 86 of the Land Revenue Act, were enacted with the object of informing the Government of the total income that was derived from the land so that the revenue might be correctly

(1) (1907) I. L. R., 29 All., 740.
(2) (1908) I. L. R., 30 All., 23.
(3) (1904) I. L. R., 27 All., 163.
(4) Weekly Notes, 1892, p. 244.
(5) Weekly Notes, 1899, p. 77.

# TABLE OF CASES CITED

PAGE.

land for any purpose Two provisions of the United Provinces Land Revenue Act, III of 1901, are relied on by the defendants as showing that the exaction of market tolls and dues is illegal We have not been referred to any other enactment Section 56 provides as follows —" In the North-Western Provinces all cesses which are payable by tenants on account of the occupation of land and which are of the nature of rent payable in addition to the rent of tenants, or in lieu of which proprietary rights may be assigned under section 78, clause *(b)*, shall be recorded by the record officer under the appellations by which they are known, and no cesses not so recorded shall be recoverable in any Civil or Revenue Court" The other section is section 86 Sub section (1) is as follows —" A list of all cesses other than those referred to in section 56 levied in accordance with village custom shall, if generally or specially sanctioned by the Local Government, be recorded by the settlement officer, and no cesses not so recorded shall be recoverable in any Civil or Revenue Court, and no such list shall be altered or added to during the currency of settlement"

It can hardly be contended that the taking of the market dues in the present case comes within section 56 The dues are not payable by tenants as such at all They are payable by persons who come and use the land in question on fair days for the purpose of buying and selling We do not think that market dues can possibly come under section 86 either In the first place, we feel the greatest difficulty in holding that the moneys paid by the frequenters of markets are "cesses" at all They are voluntary *payments made by persons who are under no obligation whatever* to make use of the market unless they please They are not levied in accordance with any village custom We think that the cesses mentioned in sections 56 and 86 of the Land Revenue Act are rates levied as a rule by the zamindar upon tenants and residents of villages We may give a few examples A levy made by the zamindar for the karinda, chaukidar or patwari would all be cesses Probably, if a zamindar thought fit to establish a market and attempted to levy a rate upon the tenants and occupiers for the up keep of the market and the payment of the market officials, this also would be a cess within the

# INDEX.

PAGE.

land for any purpose Two provisions of the United Provinces Land Revenue Act, III of 1901, are relied on by the defendants as showing that the exaction of market tolls and dues is illegal We have not been referred to any other enactment Section 56 provides as follows —"In the North-Western Provinces all cesses which are payable by tenants on account of the occupation of land and which are of the nature of rent payable in addition to the rent of tenants, or in lieu of which proprietary rights may be assigned under section 78, clause *(b)*, shall be recorded by the record officer under the appellations by which they are known, and no cesses not so recorded shall be recoverable in any Civil or Revenue Court" The other section is section 86 Sub section (1) is as follows —" A list of all cesses other than those referred to in section 56 levied in accordance with village custom shall, if generally or specially sanctioned by the Local Government, be recorded by the settlement officer, and no cesses not so recorded shall be recoverable in any Civil or Revenue Court, and no such list shall be altered or added to during the currency of settlement"

It can hardly be contended that the taking of the market dues in the present case comes within section 56 The dues are not payable by tenants as such at all They are payable by persons who come and use the land in question on fair days for the purpose of buying and selling We do not think that market dues can possibly come under section 86 either. In the first place, we feel the greatest difficulty in holding that the moneys paid by the frequenters of markets are "cesses" at all They are voluntary payments made by persons who are under no obligation whatever to make use of the market unless they please They are not levied in accordance with any village custom We think that the cesses mentioned in sections 56 and 86 of the Land Revenue Act are rates levied as a rule by the zamindar upon tenants and residents of villages We may give a few examples A levy made by the zamindar for the karinda, chaukidar or patwari would all be cesses Probably, if a zamindar thought fit to establish a market and attempted to levy a rate upon the tenants and occupiers, for the upkeep of the market and the payment of the market officials, this also would be a cess within the

# REVISIONAL CRIMINAL.

*Before Mr Justice Richards*

EMPEROR *v.* BRIJ PAL SARAN AND OTHERS.*

*Act No II of 1899 (Indian Stamp Act), section 62 (1)(b)—Stamp—Award—Unstamped award signed by parties to submission—Party signing "otherwise than as a witness"*

Where certain parties to an arbitration, who had signed the submission to arbitration also signed the award, not as witnesses, but under the heading "signature of the heirs" and the award was not stamped, it was *held* that such parties did not fall within the purview of section 62, clause (1)(*b*) of the Indian Stamp Act, 1899 as persons "executing or signing otherwise than as witnesses"

CERTAIN persons, members of the same family, referred to arbitration matters in dispute amongst them by a submission duly signed by the parties concerned The arbitrator made his award, but did not stamp it in the manner required by law The award was signed, as well as by the arbitrator, by certain witnesses, and by certain of the parties, who signed under a separate heading "signature of the heirs" The fact that the award was not stamped having subsequently come to the notice of a court, the parties who had so signed were prosecuted under section 62, clause (1)(*b*), of the Indian Stamp Act and fined On appeal the convictions were affirmed, but the fines reduced. The parties then applied in revision to the High Court.

Babu *Satya Chandra Mukerji* and Babu *Girdhari Lal Agarwala* for the applicants

Mr. *R Malcomson* (Assistant Government Advocate), for the Crown.

The judgment of the Court was delivered by

RICHARDS, J —This is an application in revision to set aside the order of the Joint Magistrate of Moradabad and the order of the Sessions Judge of Moradabad confirming the conviction, but reducing the fine to a sum of Rs 150 each The prosecution was brought under section 62 of Act II of 1899 Clause (*b*) of subsection (1) of that section provides that "any person executing or signing otherwise than as a witness, any other instrument chargeable with duty, without the same being duly stamped,

* Criminal Revision No. 675 of 1909 from an order of B R. Daniels, Sessions Judge of Moradabad, dated the 4th of September 1909

submission or in the arbitration proceeding and interested parties had signed as evidence of a waiver of the irregularity, they might perhaps be said to have signed otherwise than as witnesses In the present case, however, it must be assumed that the submission, the arbitration proceedings and the award were all perfectly regular If they were, the award bound the applicants just as effectually without their signatures as with them The document was complete when the arbitrator signed and published his award and the only result of the signatures of the applicants was to avoid the necessity of proving perhaps at some remote date the regularity of the arbitration proceedings It must be remembered that a penal Act must be read as favourably as possible for the subjects The arbitrator, who was the real person who executed and signed, and whose execution and signature was necessary, was never proceeded against I am informed that he died long before the institution of the present prosecution The expression "executed" with reference to instruments is defined in section 2 as meaning "signed" I think the word "executing" in section 62 must mean very much the same as "signing" and this must be held to mean "signing" so as to complete the document so that it may have full legal effect In my opinion under the circumstances of the present case the applicants ought not to have been convicted I accordingly allow this application, set aside the orders of the learned Magistrate and the Sessions Judge, acquit the applicants and direct that the fines, if paid, be refunded

*Application allowed*

a custom of pre emption and the lower appellate court had erred in holding it to be that of a contract The heading of the pre-emption clause of the wajib ul arz *"rawaj haq shafa wa dastur i-lawaj sani"* clearly showed that the document recorded a custom of pre emption He distinguished *Tasadduq Husain Khan* v *Ali Husain Khan* (1) and relied on an unreported decision in *Hazari Lal* v. *Durga Prasad* (2)

The respondent was not represented

STANLEY, C J, and KARAMAT HUSAIN, J —This case appears to us to be undistinguishable from the case of *Tasadduq Husain Khan* v *Ali Husain Khan* (1), which was decided by this Bench The learned pleader for the appellants endeavours to distinguish the two cases, and he also relies upon a recent decision in an appeal under the Letters Patent, namely, Appeal No 45 of 1909, decided by a Bench of which one of us was a member (2) In that case it was argued that the case of *Tasadduq Husain Khan* v *Ali Husain Khan* was not distinguishable from the case before the court but it was pointed out in the judgment that the language used in the wajib ul arz in the two cases was different in an important respect In the wajib ul arz then before the court the clause as to pre-emption ran in the following terms *"aiyanda ko jari rakhna rawaj shafa ka ham ko manzur hai"* In the wajib ul arz in the case of *Tasadduq Husain Khan* v *Ali Husain Khan*, the words are *"aiyanda ko jari rakhna rawaj haq shafa ka manzur hai"* In the judgment the importance of the introduction of the word *"haq"* between *"rawaj"* and *"shafa"* is pointed out We find the following comment in the judgment —"Now the wajib ul-arz referred to in the case of *Tasadduq Husain Khan* v *Ali Husain Khan* does differ in one material respect from the wajib ul-arz before us Between the words *'rawaj'* and *'shafa'* there comes in the important word *'haq'* In the case now before us reliance is placed upon the language of the heading of the clause dealing with pre emption, which runs as follows —*'Rawaj haq shafa wo dastur i-dawaj sani'* It is contended that *'rawaj'* properly translated is 'custom' and that therefore we should treat the subsequent language of the wajib-ul arz, in which the parties express their

(1) Weekly Notes 1903 p 131. (2) Supra p 187

STANLEY, C J, RICHARDS and TUDBALL JJ —This matter comes before us on a reference by the learned District Judge of Meerut for confirmation of the decree passed by him for dissolution of the marriage of the petitioner, Arthur Flowers, and his wife Minnie Flowers, in consequence of her adultery with the co respondent, Thomas John Moore The petitioner is a Battery Quarter Master Sergeant He and the respondent were married in the year 1898 in the Church of S Nicholas at Plumstead in Kent Since their marriage they lived together as man and wife in several places, and appear, until the co respondent came on the scene, to have lived happily In 1905 the petitioner and the respondent came to Meerut, where the petitioner was stationed with his battery, and there the petitioner met the co respondent Thomas John Moore, who was also stationed there with his regiment, the 17th Lancers They became intimate friends, and in consequence an opportunity was given to the co respondent of making advances to the respondent, which unhappily resulted, as established before the learned District Judge in adulterous connection The learned Judge has found that the adultery is proved and has given the parties a divorce

We are not satisfied upon the evidence that the learned District Judge of Meerut had any jurisdiction whatsoever to grant a decree for divorce, in view of the fact that the petitioner and his wife did not last reside at Meerut Their last residence together was at Hyderabad, Scinde, outside the jurisdiction of the District Judge of Meerut This appears from the judgment In it we find the following passage —

"The petitioner was transferred with his battery to Hyderabad (Scinde) at the beginning of this year (i e, 1906) He was unable to take the respondent with him at first, but she soon came to him there He had to return to Meerut in April last on business which was partly connected with a meeting of a lodge of free masons The respondent wished to accompany him Hyderabad (Scinde) not being a very pleasant place, he acceded to her request and brought her with him They stayed with the co respondent in his quarters" It is clear from this that the last residence of the

Ghulam Abbas attained majority on 11th October 1899, and Ghulam Sarfaraz on 29th December 1902, and on 21st December 1905 they instituted the present suit to set aside the sale under the decree of the 14th November 1894, which they contended was not binding on them because in the suit in which that decree was made their brother Ghulam Razzak, who was their guardian *ad litem* in the suit, had not been duly appointed and they had therefore not been properly represented. They also alleged that the mortgage bond of 20th December 1889 was also not binding on them because the money borrowed under it by Ghulam Dastgir was not borrowed for their benefit, nor with the sanction of the court The plaint prayed for possession of a half share in both the ancestral and acquired property purchased by the defendants (the present appellants)

The defence was that both the decree of 14th November 1894, and the bond of 20th December 1889 were binding on the plaintiffs, who had benefited by the money borrowed and been properly represented in the suit in which the decree was obtained, that the suit was barred by limitation, and that the plaintiffs could in no event recover possession without discharging the debts due by Ghulam Hazrat under the mortgages executed by him on 22nd April 1875, and 26th April 1881, which were held by the defendants

On these pleadings the first issue (the only one now material) was whether the decree and sale were binding on the plaintiffs

On this, which was the only issue he dealt with, the Subordinate Judge held that the decree dated 14th November 1894 was binding on the plaintiffs, that they were properly represented in the suit by Ghulam Razzak, a guardian *ad litem* duly appointed, *against whom no fraud collusion, or gross negligence could* be charged, that the money borrowed under the mortgage of 20th December 1889 had been obtained to satisfy decrees made on 11th July 1885 in favour of one Ramdin and on 20th December 1888 in favour of one Badri Das, that the former of those decrees was admittedly binding on the plaintiffs, and that Ghulam Dastgir was justified in taking the loans he took from Badri Das, for which a decree was subsequently made so as to bind the interests of the plaintiffs in the property in suit.

petition to him must rest on the fact that the parties last resided together within his jurisdiction The learned District Judge may in this case have been labouring under the misapprehension that the petitioner and his wife last resided at Meerut because of the temporary visit which they paid to this city. But it is clear that that temporary visit did not constitute residence within the meaning of the Act In view of the fact that the learned District Judge had not jurisdiction to entertain the petition, we have no jurisdiction to confirm the decree which has been passed It is unnecessary for us to consider the merits of the case We abstain from expressing any opinion upon the facts set forth in the petition or upon the evidence in support of the petition

Hyderabad in Scinde is not within the jurisdiction of this Court. It was in Hyderabad, Scinde, that the petitioner and respondent appear to have last resided together, and this Court has no authority to confirm the decree

We, therefore, decline to confirm it We set it aside and dismiss the petitioner's petition Under the circumstances we say nothing as to costs

*Reference rejected.*

## APPELLATE CIVIL

— —

*Before Sir John Stanley Knight Chief Justice and Mr Justice Karamat Husain*

KASHI KUNBI AND ANOTHER (PLAINTIFFS) v SUMER KUNBI AND ANOTHER (DEFENDANTS) *

*Act No III of* 1877 (*Indian Registration Act*) *sections* 17, 49—*Registration—Compromise, not embodied in the decree, containing a contract for pre-emption*

The parties to a suit filed a compromise which in addition to setting forth the rights of the parties as to the property in suit went on to provide that if either party sold his share of the property, the other party should have a right to pre-empt The decree based on this compromise was silent as to the right of pre-emption *Held* that the compromise required registration and not being registered could not be used to support a suit for pre-emption

The facts of this case were as follows —

The plaintiffs and the defendant vendor had certain disputes as to the shares each inherited from their common ancestor,

* Second Appeal No 640 of 1909 from a decree of F. H. Ashworth, District Judge of Benares dated the 1st of May 1909 confirming a decree of Hira Lal Singh Munsif of Benares dated the 2[illegible]th of February 1909

of the plaintiffs was not charged with the objectionable items of the debts I therefore find that the decree in favour of Munnu Lal (defendant 1) is binding on the plaintiffs '

The Subordinate Judge therefore dismissed the suit with costs

On appeal to the court of the Judicial Commissioner, that Court (Mr J SANDERS, first Assistant Judicial Commissioner, and Mr R GREEVEN, second Additional Judicial Commissioner), held that in the suit in which the decree of the 14th November 1894 was passed the minors (the present plaintiffs) were not properly represented, and that consequently the decree was not binding upon them Their ground was that in the appointment of Ghulam Razzak as guardian *ad litem* of the minors the provisions of section 456 of the Civil Procedure Code had not been complied with

As to this the judgements of the Judicial Commissioners' Court were as follows —

MR J SANDERS (after referring to authorities cited to show that a minor is not properly represented by a guardian not duly certificated) continued —

'The only ruling to which I have been referred which directly deals with the action of a Court in making the appointment of an unfit person as guardian *ad litem* of minors in a suit brought against them by a person to whom their property has been transferred to enforce the transfer is that to be found in the ruling *Sham Lal* v *Ghasita* (1) There a mortgagee sued to enforce a simple mortgage of ancestral property executed by the father of a joint Hindu family consisting of himself and two minor sons The mother of the minors was appointed their guardian *ad litem* The suit terminated in an *ex parte* decree against the father and the minors In a suit by the minors for a declaration their guardian it was held that the minors on the facts stated above were entitled to the decree asked for

' There the appointment of the guardian *ad litem* was found to be illegal with reference to section 457 Code of Civil Procedure I think that this is a good authority for this Court to consider whether the Court which tried the suit of Babu Munnu Lal acted illegally in appointing Ghulam Razzak as guardian *ad litem* of the present plaintiffs Their learned counsel asks this Court to hold that the appointment was illegal because it was made on the mere application of Ghulam Razzak himself unsupported by the affidavit [illegible]

(1) (1901) I. L. R 23 All., 459

*in itself* creates a right. He referred to the Registration Act, section 17, clause (*h*), and relied on *Jiwan Ali Beg* v. *Basa Mal* (1) and *The Bengal Banking Corporation* v. *S. A. Mackertich* (2). He further submitted that as the compromise formed part of the pleadings in a proper judicial proceeding, it did not require registration. He relied on *Bindesri Naik* v. *Ganga Saran Sahu* (3). A composition deed included a deed embodying an amicable arrangement of a law suit; Wharton's Law Lexicon.

Maulvi *Muhammad Ishaq* for the respondent was not called upon, but he referred to F. A. 57 of 1902, decided on 9th March 1904.

STANLEY, C. J., and KARAMAT HUSAIN, J.—We think that the view of the law expressed by the learned Munsif in his judgment is correct. It appears that the parties were involved in litigation in the court of the Subordinate Judge of Benares. They compromised the suit, filing a *sulahnama,* dated the 2nd of March 1892. In this *sulahnama* the rights of the parties in certain immovable property of the value of Rs. 100 and upwards were declared and the document therefore was compulsorily registrable in view of the provisions of sections 17 and 49 of the Registration Act. In the *sulahnama* it was provided that, if either party sold his share of the property, the subject matter of the litigation, the other party should have a right to pre-empt. A decree was passed upon the compromise, but that decree is silent as to the existence of any pre-emptive right whatever. The present suit arises out of a claim brought by two of the parties to the former litigation to have a right to pre-empt under the provisions of the *sulahnama* established. The learned Munsif dismissed the suit on the ground that the document of the 2nd of March 1892, not having been registered, was not admissible in evidence, and that the plaintiff could not therefore establish any right to pre-empt thereunder. For the view which he entertained the learned Munsif referred to the rulings in *Biraj Mohinee Dasee* v. *Kedar Nath Karmakar* (4) and in *Pitta Muthammal* v. *Esup Routher* (5). These decisions support the view of the learned Munsif. On appeal the learned

(1) (1887) I. L. R., 9 All., 108. (3) (1897) I. L. R., 20 All. 171.
(2) (1883) I. L. R., 10 Calc., 315. (4) (1908) I. L. R., 35 Calc. 1010.
(5) (1[illegible]) I. L. R., [illegible] 3[illegible]5.

example in this instance by pleading minority In a reported decision of this Court (*Mata Din* v *Ali Mirza* (1) the inconveniences attending the appointment of such a representative were indicated and the appointment was held not to be such a representation as would preclude the minors from impeaching the decree and the document underlying it Where there has been no inquiry at all into the fitness of the proposed guardian and the Court has not attempted to form any opinion on the subject it cannot be argued that the question of fitness is a matter of individual judgement upon which the Court's decision ought to be accepted I am of opinion that the appointment of an obviously unfit person who does not present an affidavit is as much a selection from a class of people expressly prohibited by the Act as the analogous instance of a married woman (*Shan Lal* v *Ghasita* (2) The duties imposed upon the Civil Courts for the protection of minors have to be positively performed, and such performance cannot be inferentially assumed in the absence of direct evidence (*Manohar Lal* v *Jadu Nath Singh* (3) On these grounds I would hold that there was no proper representation of the minors by Ghulam Razzak in the suit resulting in the decree given on the 14th November 1894

The decision of the Subordinate Judge was therefore reversed.

On this appeal

*DeGruyther, K C* and *B Dube* for the appellants contended that the respondent had been properly represented in the litigation The mere fact that an affidavit had not been put in on the application for the appointment by the Court of a guardian *ad litem* on their behalf was not sufficient to vitiate the proceedings in the previous suit Reference was made to *Walian* v *Banke Behari Pershad Singh* (4), and sections 443 and 456 of the Code of Civil Procedure (Act XIV of 1882) The respondents' interests had not been prejudiced in any way, and Ramdin's decree for which some of the money had been borrowed was admitted by a debt for which they were liable with their brothers, while the debts due to Balri Das were contracted under circumstances which created an obligation on the respondents to discharge them The decree of 14th November 1894 and the sale thereunder, were therefore, it was submitted binding on the respondents In any event they were not entitled to a decree for possession of the property in suit without redeeming the mortgages in favour of Jaisi Ram and Sanwale Singh

(1) (1903) 5 Oudh Cases 197

(2) (1901) I L R 23 All 459

(3) (1906) I L R 28 All, 585, L R 33 I A, 128

(4) (1903) I L R, 30 Calc 1021; L R, 30 I A, 182

with costs against the property of Tawajjul Husain. The decree makes no further mention of the compromise and does not purport to incorporate it as part of the decree, or contain any direction that it is to be so incorporated or to be considered as forming part of the decree. It further follows that the portions of the compromise not incorporated in the decree must be considered to have no more effect than an agreement between the parties which has not been embodied in a decree. Such an agreement as we have here ought under section 17 of the Registration Act of 1877 to have been registered. Admittedly it has not been registered. We therefore hold that it is not admissible in evidence against the plaintiffs appellants and does not bar this suit." This decision supports the judgment appealed from and is, we think, correct. For these reasons, therefore, we think that both the lower courts were right in dismissing the plaintiff's claim, and we accordingly dismiss this appeal with costs.

*Appeal dismissed.*

---

*Before Mr. Justice Sir George Knox and Mr. Justice Piggott.*

THE COLLECTOR OF SHAHJAHANPUR (JUDGMENT DEBTOR) v. KUNJ BEHARI LAL (DECREE HOLDER).*

*Civil Procedure Code (1908), section 53—Execution of decree—Effect of previous order in execution—Res judicata.*

When the court executing a decree had decided that the decree as it stood was incapable of enforcement against the ancestral property of the original debtor, but could only be enforced against property in the hands of the judgment-debtors by way of inheritance and not by way of survivorship. *Held* that the decision was *res judicata* between the parties to the decree and was not affected by the provisions of sections 52 and 53 of the Code of Civil Procedure, 1908.

THE facts of this case were briefly as follows:—

In April 1903 the decree-holder obtained a decree against the son and grandson of his original debtor, and the decree stated that the judgment-debtors mentioned therein should be liable only as heirs of the deceased debtor. The decree-holder took out execution and attached one village, Sumaria. It was objected that this village had come into the hands of the judgment-debtors by survivorship and was not liable to attachment. The objection

---

* First Appeal No. 213 of 1909 from a decree of Muhammad Mubarak Husain, Subordinate Judge of Shahjahanpur, dated the 20th of April 1909.

Ghulam Razzak their guardian *ad litem*. The order is on the record and it must be presumed, in the absence of evidence to the contrary, that everything was regularly and properly done

The case that was referred to of *Walian* v. *Banke Behari Pershad Singh* (1) is really a much stronger case, because there the person who acted as guardian *ad litem* was not formally appointed, but he was recognised as guardian *ad litem* by the Court in the progress of the suit, and it was held by this Board that after that recognition it was too late to dispute his appointment.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed. The respondents must pay the costs of the appeal

*Appeal allowed.*

Solicitors for the appellants :—*Barrow, Rogers & Nevill.*

Solicitors for the respondents :—*T L Wilson & Co.*

J. V W.

---

BRIJ NARAIN (DECREE-HOLDER) *v* TEJBAL BIKRAM BAHADUR (JUDGEMENT DEBTOR)

litigation

in on the a ppeal from the High Court of Judicature at Allahabad ]

*dment or alteration of decree—Amendment by Subordinate Judge*
dian *ad lit ee after it had been affirmed by High Court on appeal—Future*
proceedings *uck out of decree not being in accordance with judgement—*
v *Banke* *] limited to one decree holder of joint decree on appeal to High*
456 of the *al Procedure Code (1882) sections 206—209*

, several mortgage decree passed by the court of a Subordinate
respondent ection 88 of the Transfer of Property Act (IV of 1882), which gave
Ramdin's t on the amount decreed, was affirmed on appeal by the High Court
was adm t, on the application of the judgement debtor (the respondent, who
brothers, in the court the whole amount due under the decree, including
under c est) the Subordinate Judge notwithstanding objections by the decree-
mended his decree by striking out the future interest on the ground
dents an interest was not in accordance with the judgement on which the decree
th based The decree holders (the appellant and another who was a transferee
o he original decree holders) made separate applications to the High Court for
t ision of the Subordinate Judge's order On the application of the transferee
ree-holder a Bench of the High Court held that the Subordinate Judge had no
urisdiction to amend a decree which had been affirmed by the High Court, and
it aside his order, but only so far as it affected the transferee decree holder. On

*Present* :—Lord MACNAGHTEN, Lord COLLINS, and SIR ARTHUR WILSON

(1) (1903) I. L R, 30 Calc, 1021, L R., 30 I A., 182.

Pandit *Baldeo Ram Dave* (for the Hon'ble Pandit *Sundar Lal*), for the respondent:—

Before section 53 of the new Code was enacted there was a conflict of opinion as to whether the liability of the sons could be determined in the execution department or by a regular suit. He cited *Lachmi Narain* v. *Kunji Lal* (1) and *Amar Chandra Kundu* v. *Sebak Chand Chowdhury* (2). By enacting section 53 the Legislature declared that all property in the hands of an heir shall be deemed to have come to him as the legal representative of his ancestor. Therefore, whether the villages were inherited or had come to the judgment debtors by survivorship, they were liable. The order of 19th July 1902 only determined that the liability of the son could be determined in the execution department, as was laid down in I. L. R., 16 All., 449.

KNOX and PIGGOTT, JJ.—This appeal in an execution case arises out of the following facts. In April 1902 Kunj Behari Lal, respondent in this Court, obtained a decree against Kunwar Mahendra Singh and Budh Pal Singh, the son and grandson respectively of Raja Narain Singh, in respect of a debt incurred by the said Raja. The decree holder in the year 1902 sought to execute this decree by attachment and sale of a village which was found to be ancestral property of Raja Narain Singh. The court executing the decree held that the decree, as it stood, was incapable of enforcement against the ancestral property of the original debtor, but only against property in the hands of the judgment-debtors by way of inheritance from Raja Narain Singh, and not by way of survivorship as members of the same joint Hindu family. This decision was acquiesced in by the decree-holder, who, in fact, made an ineffectual attempt to obtain a review of the decree from the court which had passed it. In the month of March 1909 the decree holder again took out execution against property which was the ancestral property of Raja Narain Singh. He claims to be entitled to do this, because of the provisions of sections 52 and 53 of the new Code of Civil Procedure, Act No. V of 1908. We are of opinion that these provisions do not help him. In the decree of April 1902 Kunj Behari Lal was expressly given the right to recover certain money only from such property as might

(1) (1894) I. L. R., 16 All., 449. (2) (1907) I. L. R., 34 Calc., 642.

under section 88 of Act IV of 1882, dated 30th January 1901, and having obtained the decree under section 89 of the Act, they went on executing the decree of this Court until on account of the hypothecated property being ancestral the execution proceedings in connection with the sale of the said property were transferred to the Collector of Bijnor on 30th November 1901, and again on the 30th September 1902, while the appeals of the parties from the said original decree were still pending in the High Court The High Court's judgements and decrees in appeal which were delivered and passed on the 1st December 1902, contained not the least-mention of interest pending litigation or future interest, and it does not appear that the High Court's decree in appeal was ever executed or even mentioned in any proceeding connected with execution of decree I therefore think that as the decree holders in this case executed the original decree passed by this Court after obtaining a decree under section 89 of Act IV of 1882 on the basis of the said decree while the appeals from the said decree were pending in the High Court, and the High Court s decree was not executed by the decree holders even after it was passed on the 1st December 1902, the judgement debtors present application for amendment of the original decrees under sections 88 and 89 is maintainable in this Court and I can amend them on the application of the judgement-debtor, and the abovementioned rulings cited by the decree holders' pleader are not applicable to the present application for amendment of the decree"

The order was that "the decree be amended in this way, that the sums of money on account of interest *pendente lite* and future interest be struck out from the said decrees and deducted from the whole amount declared as due under them."

As the decree-holder Lachman Das was only a transferee of the original decree-holders, and not a party to the original decree, two separate applications were made by Brij Narain and Lachman Das to the High Court for revision of the Subordinate Judge's order.

The High Court (KNOX and AIKMAN, JJ.) in Lachman Das' application said —

"The order, the revision of which is asked for, is an order passed by the Subordinate Judge of Moradabad amending a decree of his court Previous to the order of amendment the decree had been affirmed on appeal by this court

"The Subordinate Judge had therefore no jurisdiction to amend, *vide* the Full Bench decisions of this court *Muhammad Sulaiman Khan* v *Muhammad Yar Khan* (1) and *Muhammad Sulaiman Khan* v *Fatima* (2). We therefore allow the application and set aside the order amending the decree, but only so far as it affects the interests of the applicant, Lachman Das."

In the matter of the application of the appellant Brij Narain they were of opinion that looking to all the circumstances of the

(1) (1888) I L R, 11 All., 267. (2) (1889) I. L. R., 11 All., 314.

defendants took a lease from the plaintiff alone and on the expiration of that lease the defendants continued to remain in possession of the property on the basis of the lease Subsequently to the years for which the rent is claimed in this litigation the defendants were ejected in a suit brought by the plaintiff alone Both the lower courts have given a decree for the amount of the arrears This appeal has been preferred, and the grounds of appeal are substantially that there has been litigation between the plaintiff and other parties in relation to the property in dispute, and other property, which is alleged to be endowed property, and that the defendants, if they pay the arrears of rent to the plaintiff, may be held responsible for the same at the suit of other parties In other words they question the title of the plaintiff to make the lease under which they took and have been in possession It is one of the best settled rules of law that a lessee is estopped from denying his lessor's title In the case of *Musammat Purnia* v *Torab Ally* (1), it was held that the question of the lessor's title was one foreign to a suit for rent instituted against the lessee, though the ostensible lessor might be merely a trustee and as such liable to account to the *cestui que* trust This case is cited in the case of *Jainarayan Bose* v *Kadimini Dassi* (2) The courts below were right in the decision at which they arrived, and we dismiss this appeal with costs

*Appeal dismissed.*

(1) 3 Wyman 14 (2) (1869) 7 B L R, 723

defendant's appeal, and with a slight modification affirmed the decree of the First Court on the cross appeal.

On the 5th October 1901, on the application of the original decree-holders, the First Court made an order absolute for sale of the mortgaged property under sections 89 and 93 of the Transfer of Property Act for the amount decreed, together with future interest. Thereafter the present appellant applied to the First Court for execution of the said decree, and after certain intermediate proceedings, which it is not necessary to refer to in detail, the judgement debtor on the 21st November 1903, deposited the entire amount due under the decree, with future interest

On the 9th February 1904, the present respondent, the judgement debtor, applied to the First Court to amend the said decree by striking out so much of it as awarded future interest on the amount decreed In March 1904, petitions objecting to the application of the judgement debtor on various grounds were filed on behalf of the present appellant and Lachman Das With reference to the allegations of the parties, the Subordinate Judge framed the following issues for trial —

1 Whether the judgement-debtor's application for amendment of decrees is barred by limitation?

2 Whether the said application is barred by section 13 of the Civil Procedure Code?

3 Whether the decrees of this court under sections 88 and 89 of Act IV of 1882 can be amended by this court as requested by the judgement debtor?

4 Whether the judgement-debtor has a right to apply for amendment of the said decrees?

On the 11th June 1904, the Subordinate Judge made an order granting the application of the judgement debtor He found the four issues in his favour, and amended the two decrees of the court made under sections 88 and 89 of the Transfer of Property Act by striking out of them the provision for future interest, the effect of such amendment or modification being to reduce the amount payable under the decrees by a sum of over Rs 19,000

Two applications were therefore presented to the High Court by the present appellant and the said Lachman Das for revision of the order of the Subordinate Judge, dated the 11th June 1904 They were heard by a Divisional Court, constituted by two learned judges of the High Court, who on the 23rd February

Babu *Sarat Chandra Chaudhri* (for Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* with him) for the appellants contended that the plaintiff was not entitled to bring the present suit. Having obtained an unconditional decree for possession in the suit of 1884, the plaintiff should have proceeded to execute it, he had no other remedy. That suit was, in effect one for possession pure and simple, on the ground that the mortgage had already been redeemed, for, as soon as the deposit was made, the mortgage was extinguished. The decree, properly interpreted, was one for immediate possession unconditionally, and in such a case the plaintiff's rights merged in the decree and the only remedy available to him was the execution of the decree, *Sita Ram* v. *Madho Lal* (1). Before the date on which the plaintiff brought the suit of 1884 he had done everything that was required to be done before he could get a decree for possession, the amount payable by him had already been judicially determined, and had been duly deposited by him for payment to the mortgagees, and thereby the mortgage had been fully discharged, *Rugal Singh* v. *Sat Narain Singh* (2). What remained for the court to do was only to give a decree for possession, and it accordingly gave a decree for possession unconditionally.

Dr. *Tej Bahadur Sapru*, for the respondent, contended that the whole question in the case was as to what the effect of the decree of 1884 was. A decree under section 92 of the Transfer of Property Act was not enough alone to extinguish the mortgage. Even if the decree of 1884 was regarded as one quite in form and in accordance with section 92, it was not by itself sufficient to put an end to the equity of redemption, *Dondh Bahadur Rai* v. *Tek Narain Rai* (3) and *Sita Ram* v. *Madho Lal* (1). The words "*bad dilaiyane*" occurred in the relief claimed in the suit of 1884. That was not a relief proper to a suit for possession pure and simple. It showed that the plaintiff himself did not say that the mortgage had been extinguished. The mortgagees had declined to accept the amount deposited. Unless and until they had got the money, or an order under section 93 of the Transfer of Property Act had been passed, the equity of redemption would continue to

(1) (1901) I. L. R. 24 All. 44. (2) (1904) I. L. R. 27 All. 17.
(3) (1899) I. L. R. 21 All. 251.

Lachmas Das, so also the alteration in P... was equally ineffectual, and ought not to have been ...

Their Lordships will humbly advise His Majesty ... appeal should be allowed The respondent will pay the ...

Appeal allowed.

Solicitors for the appellant —Barrow, Rogers and ...

J V W

# APPELLATE CIVIL.

*Before Mr Justice Sir George Knox and Mr Justice Richards.*

IMAM UD-DIN AND ANOTHER (JUDGEMENT DEBTORS) v SADARUDDIN ... (DECREE HOLDER)*

*Abatement of appeal—Death of a respondent pending appeal—Representative not brought on record—Decree against all—Cause of action ... in favour of other respondents—Civil Procedure Code (1882) section 368—Pre emption*

One of the defendants respondents in a suit for pre-emption died ...

against the other respondents the decree must be set aside as a whole. *Raj Chunder Sen v Ganga Das Seal* (1) referred to *Imdad Ali v Jagan Lal* (2) distinguished

THE facts of this case were as follows —

THE decree holder plaintiff who had instituted a suit for pre-emption, obtained a decree on the 15th April, 1907, from the High Court in S A 588 of 1905 At the date of the above judgement the Court was in ignorance of the fact that Nanhu one of the defendants respondents, had died on 28th October, 1906 The decree-holder paid into court the purchase money and applied in execution of his decree for possession on 24th August, 1907, and obtained possession on 3rd September, 1907 The present appellants, who were the two judgement debtors other than the deceased, Nanhu applied to the executing court on 25th September, 1907, for re delivery of possession to them, on the ground that as the decree was passed after the death of Nanhu it was

*Second Appeal No 719 of 1908 from a decree of H Dupernex District Judge of Saharanpur dated the 22nd of May 1908 confirming a decree of Sudarshan Dyal Munsif of Deoband dated the 3rd of February 1908

(1) (1904) I L R, 31 Calc 487 (2) (1895) I L R., 17 All., 478.

Babu *Sarat Chandra Chaudhri* (for Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* with him) for the appellants contended that the plaintiff was not entitled to bring the present suit Having obtained an unconditional decree for possession in the suit of 1884, the plaintiff should have proceeded to execute it, he had no other remedy That suit was, in effect one for possession pure and simple, on the ground that the mortgage had already been redeemed, for, as soon as the deposit was made, the mortgage was extinguished The decree, properly interpreted, was one for immediate possession unconditionally, and in such a case the plaintiff's rights merged in the decree and the only remedy available to him was the execution of the decree, *Sita Ram* v *Madho Lal* (1) Before the date on which the plaintiff brought the suit of 1884 he had done everything that was required to be done before he could get a decree for possession, the amount payable by him had already been judicially determined, and had been duly deposited by him for payment to the mortgagees, and thereby the mortgage had been fully discharged, *Rugad Singh* v *Sat Narain Singh* (2) What remained for the court to do was only to give a decree for possession, and it accordingly gave a decree for possession unconditionally

Dr *Tej Bahadur Sapru*, for the respondent, contended that the whole question in the case was as to what the effect of the decree of 1884 was A decree under section 92 of the Transfer of Property Act was not enough alone to extinguish the mortgage Even if the decree of 1884 was regarded as one quite in form and in accordance with section 92, it was not by itself sufficient to put an end to the equity of redemption, *Dondh Bahadur Rai* v *Tek Narain Rai* (3) and *Sita Ram* v *Madho Lal* (1) The words "*bad dilai jane*" occurred in the relief claimed in the suit of 1884 That was not a relief proper to a suit for possession pure and simple It showed that the plaintiff himself did not say that the mortgage had been extinguished The mortgagees had declined to accept the amount deposited Unless and until they had got the money or an order under section 93 of the Transfer of Property Act had been passed, the equity of redemption would continue to

(1) (1901) I L R 24 All 44 (2) (1904) I L R 27 All 17
(3) (1899) I L R 21 All 251

Lachmas Das, so also the alteration in Brij Narain's case was equally ineffectual, and ought not to have been allowed to stand. 1

Their Lordships will humbly advise His Majesty that this appeal should be allowed. The respondent will pay the costs.

*Appeal allowed.*

Solicitors for the appellant:—*Barrow, Rogers and Nevill*

J. V. W.

## APPELLATE CIVIL.

*Before Mr. Justice Sir George Knox and Mr Justice Richards.*

IMAM-UD-DIN AND ANOTHER (JUDGMENT DEBTORS) *v.* SADARATH RAI (DECREE HOLDER)*

*Abatement of appeal—Death of a respondent pending appeal—Representative not brought on record—Decree against all—Cause of action not surviving in favour of other respondents—Civil Procedure Code* (1882), *section* 368—*Pre-emption.*

One of the defendants respondents in a suit for pre emption died pending appeal. No application was made within limitation to bring his representatives on to the record, but the appeal was decreed as against all the respondents.

*Held* that the suit being one in which the cause of action did not survive against the other respondents, the decree must be set aside as a whole *Raj Chunder Sen* v. *Ganga Das Seal* (1) referred to *Imdad Ali* v. *Jagan Lal* (2) distinguished.

THE facts of this case were as follows:—

THE decree-holder plaintiff who had instituted a suit for pre-emption, obtained a decree on the 15th April, 1907, from the High Court in S. A 588 of 1905 At the date of the above judgement the Court was in ignorance of the fact that Nanhu, one of the defendants respondents, had died on 28th October, 1906. The decree-holder paid into court the purchase money and applied in execution of his decree for possession on 24th August, 1907, and obtained possession on 3rd September, 1907. The present appellants, who were the two judgement-debtors other than the deceased, Nanhu, applied to the executing court on 25th September, 1907, for re delivery of possession to them, on the ground that as the decree was passed after the death of Nanhu, it was

*Second Appeal No. 719 of 1908 from a decree of H Dupernex, District Judge of Saharanpur, dated the 22nd of May 1908, confirming a decree of Sudarshan Dyal, Munsif of Deoband, dated the 3rd of February 1908

(1) (1904) I. L. R., 31 Calc., 487. (2) (1895) I. L R., 17 All., 478.

On the essential point of law involved we think that the general effect of these rulings is very accurately stated by the learned District Judge in the following words —" Where a mortgagor brings a suit for redemption and obtains a conditional decree, but omits to fulfil the conditions imposed upon him, he is not debarred from bringing a second suit for redemption unless the decree lays down that if he fails to fulfil these conditions the property will be sold or he will be debarred from all right to redeem " We have ourselves in a recent case reaffirmed the law in the above sense Reliance was placed in the course of argument on certain expressions used by the learned Judges who decided the case of *Rugad Singh* v *Sat Narain Singh* above referred to It is necessary to remember what was the precise point for determination in the above case The equity of redemption in respect of a certain mortgage had been broken up and acquired by different persons at different times and in various proportions One of these deposited the entire sum due to the mortgagee under section 83 of the Transfer of Property Act and brought a suit for possession by redemption in respect of the whole mortgaged property The question before the Court was whether in this same suit a person who had acquired another portion of the equity of redemption could be given a decree in respect of his own share This was held to be impossible for various reasons, and amongst others because the original plaintiff in that case had already satisfied the mortgagees so that nothing remained due to the latter from the moment the deposit under section 83 of the Transfer of Property Act was made We do not think the learned Judges intended to lay down any such general proposition as that a person making such a deposit is bound to sue the mortgagee simply for possession, and not for possession by redemption, subject to payment—that is to say, to actual delivery to the mortgagee under the orders of the court—of the sum deposited or such other amount as may be found due to him

As a matter of fact, however, we are not so much concerned with the kind of suit which ought to have been brought by the present plaintiff in 1881, or with the kind of decree which ought to have been passed, as with the suit actually brought and the decree in which it resulted The suit was not one for possession

Mr. *M. L. Agarwala*, for the decree-holder, contended that the decree as far as the judgement debtors, who were alive were concerned, was a perfectly good decree. He relied on *Imdad Ali* v. *Jagan Lal* (1), *Ram Sahai* v. *Gaya* (2) and *Inayat Ullah* v. *Gopal Narain* (3). As regards the application, he submitted that it would be governed by Article 178 of the Limitation Act and the three years' rule would apply.

The judgement of the Court dealing with the facts of the whole case was delivered in connection with the application for review:—

KNOX and RICHARDS JJ.:—This application for review and the connected second appeal arise out of a suit for pre-emption. The second appeal in this suit came before one of us on the 15th of April 1907, with the result that the suit was decreed, subject to the payment of the purchase money It now transpires that at the date this judgement was given one of the respondents was dead. The judgement, of course, was passed in ignorance of his death. It is admitted that the suit was one in which the cause of action did not continue against the surviving defendants. It was necessary to bring on the record the representatives of the deceased respondent. The respondent died on the 28th of October, 1906. An application for execution of the decree was made on the 24th of August, 1907. Possession was obtained on the 3rd of September, 1907. Imamuddin and Karimuddin applied to the execution court to set aside the execution on the ground that the decree having been passed after the death of Nanhu was void and of no effect. There was a similar application about the same time by the wife and children of Nanhu. The court set aside the execution as to the share of Nanhu, deceased, but refused to set aside the execution as against the other judgement-debtors. This decision was confirmed on appeal The second appeal before us is the appeal by Imamuddin and Karimuddin against so much of the order as allowed the execution to stand against them They contend that the decree was invalid and could not be executed in part. It seems to us that the proper course for the plaintiff decree holder to have taken was, as soon as possible after it was discovered that Nanhu was dead, to have

(1) (1895) I. L. R., 17 All., 478. (2) (1884) I. L. R., 7 All., 107.
(3) Weekly Notes, 1901, 167.

tried for, at the same trial, three offences under section 408 of the Indian Penal Code and three offences of forgery under section 467 of the Code He was convicted of and sentenced for all six offences It was found that he had embezzled three separate sums of money paid in by three depositors, and had in each case given a receipt upon which he had forged the signature of the Manager of the Bank In appeal from the order of the Sessions Judge the question arose whether the whole trial was not illegal.

Mr A H C *Hamilton*, for the appellant

Mr *R Malcomson* (Assistant Government Advocate) for the Crown

TUDBALL J —The appellant Sheo Saran Lal was the clerk of the Kasia Co operative Bank in the Gorakhpur District in the year 1898 He has been charged and tried at one and the same trial for three offence under section 408 of the Indian Penal Code, and three offences of forgery under section 467 of the Indian Penal Code He has been convicted and sentenced in respect of all the six offences The case against him is that three different persons seeking to deposit money in the Bank, gave over certain sums to him which he embezzled, and for which he gave receipts in his own handwriting forging thereon the signature of the Manager of the Bank The primary question arises as to whether the trial of the accused at one trial in respect of six offences is or is not an illegality, under the circumstances of the case Section 233 of the Criminal Procedure Code lays down a distinct rule that there shall be a separate charge for every distinct offence and that every such charge shall be tried separately, except in the cases mentioned in sections 234, 235 236 and 239 Section 234 lays down that when a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may be charged with and tried at one trial for any number of them not exceeding three Offences of the same kind are defined as offences which are punishable with the same amount of punishment under the same section of the Indian Penal Code, or of any special or local law

*Prima facie*, the trial of the accused in respect of six offences at one and the same trial, although they may have been committed

delay. Their Lordships of the Privy Council held that the appeal being one in which the cause of action did not survive against the remaining respondent, the appeal abated Applying this ruling to the present case, it is quite clear that as no representatives were brought on the record in the place of Nanhu the appeal abated. In our judgement the decree which was passed on the 15th of April, 1907, was not capable of being executed either against the surviving judgement debtors or the representatives of Nanhu The present application fails and is dismissed with costs

In the appeal, the following judgement of the Court was delivered —

For the reasons given in our judgement on the application of Sadarath Rai for review of judgement we allow this appeal and set aside the orders of both the courts below so far as they refuse to restore the property to the judgement-debtors on the condition that Imamuddin and Karimuddin do first repay the amount of money received by them from the decree holder The appellants will have their costs

*Application for review dismissed*

*Appeal decreed.*

---

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji*

DURGA DAT JOSHI (DEFENDANT) *v* GANESH DAT JOSHI AND ANOTHER (PLAINTIFFS) *

*Hindu law — Mitakshara — Partition — Self acquired property — Gains of science—Astrology—Earnings made by unaided efforts without detriment to the family property*

In a joint Hindu family governed by the Mitakshara one of the sons obtained certain elementary education in astrology from his father but no money of the family was expended on that education While still quite young this son ceased to live with the rest of the family continued his studies in astrology on his own account and ultimately managed by the exercise of his skill as an astrologer, to acquire a considerable sum of money without detriment to the family property *Held* that this money was his self acquisition and could not properly be regarded as belonging to the joint family

Katyayana's definition of "acquisition through learning which is not participable" cited in the Mitakshara [I 4 8] is not exhaustive but illustrative

---

* First Appeal No 231 of 1908 from a decree of Aziz ur Rahman, Subordinate Judge of Benares, dated the 1st of July 1908

on the charges preferred against him, in accordance with law. It will be open to the Sessions Judge to divide the trial into two or three trials as he may think fit

*Appeal allowed*

[See also *Emperor* v *Mata Prasad*, I L R, 31 All., 351, and *Emperor* v *Salim-ullah*, I L R, 32 All., 57—Ed]

## REVISIONAL CIVIL

*Before Mr Justice Sir George Knox and Mr Justice Richards*

GOSWAMI SRI RAMAN LALJI MAHARAJ (OBJECTOR), v BOHRA DESRAJ, (OPPOSITE PARTY) *

*Act No XII of* 1887 (*Bengal N-W P and Assam Civil Courts Act*), *section* 21—*Act No VII of* 1870 (*Court Fees Act*), *section* 11—*Valuation of suit*—*Appeal*—*Jurisdiction*

So long as there has been no order accepted by the plaintiff to make good a deficiency in court fees the original value assigned by the plaintiff must be taken as the value of the suit for the purpose of regulating the jurisdiction of the appellate court, but when there has been such an order made and accepted by the plaintiff from that moment the value of the suit must be taken as being in accordance with the fee actually paid by the plaintiff *Ijjatulla Bhuyan* v *Chandra Mohan Banerjee* (1) followed *Madho Das* v *Ramji Patak* (2) distinguished.

THE facts of this case were as follows —

One Desraj brought a suit for recovery of Rs 1,945 on a hypothecation bond and offered to redeem prior mortgages, if the prior mortgagees proved their debt The decree was however passed on a compromise conditioned on redemption of prior mortgages amounting to Rs 15,700 and payment of requisite court fees The applicant was to pay the mortgage money by instalments The judgment debtor did not pay the decretal amount; the decree holder applied under section 89, Transfer of Property Act, to have the order made absolute. The judgment-debtor filed an objection. The Subordinate Judge disallowed it and made the order absolute The unsuccessful objector filed an appeal before the District Judge, who returned the memorandum of appeal to be presented in the High Court.

Pandit *Mohan Lal Sandal*, for the applicant —The original valuation of the suit being about Rs 2,000, the court of the District Judge was competent to hear the appeal He referred to

* Civil Revision No. 41 of 1909

(1) (1907) I. L. R., 34 Calc., 954. (2) (1894) I. L. R., 16 All., 286.

on by them was carried on as a joint family business, Ganesh Dat doing all the work as manager of the family He claimed that the moneys received by Ganesh Dat as a return for his services as astrologer and the property acquired with such moneys formed joint family property and should be brought into hotchpot in the partition sought to be effected In a schedule to the written statement a large quantity of property is specified which the defendant alleges formed part of the joint family property

The court below held that the sum deposited in the kothi of Babu Sita Ram, Kesho Ram was ancestral property and that the defendant's allegation that it was his mother's *stridhan* was without foundation It also held that no will was made by the defendant's mother as alleged, and that the allegation that the defendant's mother gave the money in deposit to the defendant's wife and jewelry to Ganesh Dat's wife was a made up story It also held that the old ancestral house and the profits of the alluvial lands deposited with Sita Ram and Kesho Ram were partible as joint family property As to the properties claimed by the defendant to be ancestral, the court below held as to some of them that they never existed, and as to those that existed that they were acquired after the death of Baldeo Dat by the plaintiff Ganesh Dat alone As to this last mentioned property the court found that it was acquired by Ganesh Dat by his own intellectual exertions and as the reward of his services as an astrologer. It held that it was fully established beyond possibility of contradiction that Ganesh Dat did not have in his possession any of the ancestral properties or their income, or the profits of them, that the principal of the money deposited with Sita Ram Kesho Ram was still in deposit and the interest was from time to time taken and appropriated by the defendant and his mother and plaintiff never touched it The court below further found that as to three houses, which the defendant claimed to be joint family property, they were acquired by Ganesh Dat after the death of his father and that he paid the consideration for them out of his own earnings and that the defendant had no right to claim any share in those houses A decree for partition was accordingly given for the property found to be joint ancestral property.

Judge shall lie to the District Judge where the value of the original suit in which, or in any proceeding arising out of which the decree or order was made, did not exceed Rs. 5,000, and to the High Court in any other case." The question really is what was the value of the suit? If the value of the suit was only Rs. 1,945, as contended by the applicant, then the appeal did lie to the District Judge, and it makes no difference that the decree was a decree for a larger sum than Rs. 5,000. It is admitted by the learned vakil of the applicant that if before the decree the court had found that the suit was undervalued and the deficiency had been made good, then the value of the suit would be the value after the deficiency had been made good and not the valuation which the plaintiff had originally placed thereon. He argues that the decree of the court ordering him to make good the deficiency before proceeding to sell the property for the aggregate amount of his own and the prior mortgages was conditional, and reliance is placed upon *Madho Das* v. *Ramji Patak* (1). All that was decided in that case was that the mere fact that a decree for a larger sum was made does not interfere with the original valuation of the suit. We quite agree with it. So long as there has been no order accepted by the plaintiff to make good the deficiency, the original value placed by the plaintiff must be taken as the value of the suit for the purpose of regulating the proper appellate court, but we think that, when there has been such an order accepted by the plaintiff, from that moment the value of the suit must be taken as being in accordance with the fee paid by the plaintiff. This view was accepted by a Full Bench of the Calcutta High Court in *Ijjatulla Bhuyan* v. *Chandra Mohan Banerjee* (2). We dismiss the application with costs.

*Application dismissed.*

(1) (1894) I. L. R., 16 All., 285. (2) (1907) I. L. R., 34 Calc., 954.

his father's income and should not give any of his income to his father, that his mother and Durga Dat continued to live in the old ancestral house, and that his father at the time of his death had Rs 5,530 in deposit in his name in the kothi of Babu Sita Ram, and that he, the witness, had about Rs 6 000 deposited in his own name in the same kothi, that after his father's death his mother and Durga Dat were maintained out of the money of Baldeo Dat deposited in the kothi of Babu Sita Ram, and that he, the plaintiff, did not support his mother or Durga Dat, or furnish them with funds, that he purchased a house at an auction sale about 24 years ago and subsequently rebuilt it, and after the building was completed he lived in it, that his father supported his wife as long as he lived, that after his death she went to her parent's house in the Alwar State until the house which he had purchased was ready for her use, and that since then she has been living with him in that house He further stated that any property which was left by his father was in the possession of the defendant Then he deposed to the building of a house described as No 73 with his own money and also to the purchase of a house bearing the No 72 in the name of his son, and another house bearing the No 107 in his own name He also stated that he had in deposit with the Bank of Bengal a sum of Rs 7,000, also a sum of Rs 6,000 in deposit with Babu Narendra Bahadur, and a sum of Rs 2 000 lent to one Babu Chunnu Lal, that these and other moneys to which he refers, the details of which it is unnecessary to give, exclusively belonged to him and represented his earnings The defendant never, he said, gave him any help in his work as astrologer, nor did he help him in any way in connection with the houses which he built, and the land which was granted to him by the Maharaja of Benares, was granted to him personally It is apparent from the evidence that the plaintiff acquired the confidence of the public as an astrologer and by his unaided efforts was able to amass a considerable sum of money representing his exclusive earnings It is also clear that this money was obtained without detriment to the family property The plaintiff, as he says, no doubt obtained his elementary education in astology from his father, but no money of the family was expended on that education

person trained in arms by his father or brothers, the gains of his valour are divisible among the family according to Vrihaspati In the text of Katyayana on the subject we find him quoting authority for his position Unfortunately we do not possess the texts which were probably before him" Later on he says — "From the above it is tolerably clear that the rule of Manu as modified by Narada, agreeing as it does with that of Vishnu, Gautama and Yajnavalkya, is the law governing self-acquisitions, including gains of learning, and that it is a simple rule consonant with reasoning and natural justice" (2nd edition pages 520, 521, 522) At the age of fourteen, the plaintiff left his father's house and from the evidence we gather that any education which he received from his father was such elementary education as a boy of tender years could imbibe In regard to advanced education in the science of astrology he was a self taught man In the case of *Lachmin Kuar* v *Debi Prasad* (1) the facts were these three brothers, Ram Narain, Sheo Narain and Jai Narain, whose ancestral home was at Bilar in the Cawnpore district, went out into the world and obtained employment in the Commissariat department, and in the course of time each acquired considerable wealth They were not shown to have had any assistance from the joint family funds except in their support in early years and rudimentary education It was not shown that any money was raised on the ancestral house to start any of them in life They did not work jointly and no one of them was shown to have had any concern with the savings and accumulations of the other brothers The question before the Court was whether the savings and accumulations of one of the brothers formed joint family property, and it was contended in support of the affirmative that Sheo Narain was educated when a boy at the family expense, and that, therefore his subsequent earnings and accumulations should be treated as joint family property Burkitt and Dillon, JJ, repelled this contention and referred to the observations of their Lordships of the Privy Council in *Pauliem Valoo Chetty* v *Pauliem Sooryah Chetty* (2), in the course of which a similar contention was stated to be "a somewhat startling proposition of law." They held that the fruits

(1) (1898) I L R 20 All, 435 (2) (1877) I L R 1 Mad, 252

person trained in arms by his father or brothers, the gains of his valour are divisible among the family according to Vrihaspati In the text of Katyayana on the subject we find him quoting authority for his position Unfortunately we do not possess the texts which were probably before him " Later on he says — "From the above it is tolerably clear that the rule of Manu as modified by Narada, agreeing as it does with that of Vishnu, Gautama and Yajnavalkya, is the law governing self-acquisitions, including gains of learning, and that it is a simple rule consonant with reasoning and natural justice " (2nd edition pages 520, 521, 522) At the age of fourteen, the plaintiff left his father's house and from the evidence we gather that any education which he received from his father was such elementary education as a boy of tender years could imb be In regard to advanced education in the science of astrology he was a self taught man In the case of *Lachmin Kuar* v *Debi Prasad* (1) the facts were these three brothers, Ram Narain, Sheo Narain and Jai Narain, whose ancestral home was at Bilar in the Cawnpore district, went out into the world and obtained employment in the Commissariat department, and in the course of time each acquired considerable wealth They were not shown to have had any assistance from the joint family funds except in their support in early years and rudimentary education It was not shown that any money was raised on the ancestral house to start any of them in life They did not work jointly and no one of them was shown to have had any concern with the savings and accumulations of the other brothers The question before the Court was whether the savings and accumulations of one of the brothers formed joint family property, and it was contended in support of the affirmative that Sheo Narain was educated when a boy at the family expense, and that, therefore, his subsequent earnings and accumulations should be treated as joint family property Burkitt and Dillon, JJ, repelled this contention and referred to the observations of their Lordships of the Privy Council in *Pauliem Valoo Chetty* v *Pauliem Sooryah Chetty* (2), in the course of which a similar contention was stated to be 'a somewhat startling proposition of law " They held that the fruits

(1) (1898) I L R 20 All, 435 (2) (1877) I L R 1 Mad. 2 2

# DISTRICT

# GAZETTEERS,

## UNITED PROVINCES.

---

*The undermentioned Gazetteers of Districts in the United Provinces have recently been published by the Government Press, and are available for sale to the public at the Government Book Depot, Allahabad. The prices quoted include packing and postage charges :—*

| District | | Rs. | a. | p. |
|---|---|---|---|---|
| **Bulandshahr** | ... | 3 | 6 | 0 |
| **Bahraich** | ... | 2 | 14 | 0 |
| **Sultanpur** | ... | 2 | 14 | 0 |
| **Unao** | ... | 3 | 6 | 0 |
| **Hardoi** | ... | 3 | 6 | 0 |
| **Bara Banki** | ... | 3 | 6 | 0 |
| **Sitapur** | ... | 2 | 14 | 0 |
| **Kheri** | ... | 2 | 14 | 0 |
| **Meerut** | ... | 3 | 6 | 0 |
| **Lucknow** | ... | 3 | 6 | 0 |
| **Ballia** | ... | 3 | 6 | 0 |
| **Muzaffarnagar** | ... | 3 | 6 | 0 |
| **Naini Tal** | ... | 3 | 6 | 0 |
| **Rae Bareli** | ... | 2 | 14 | 0 |
| **Partabgarh** | ... | 2 | 14 | 0 |
| **Fyzabad** | ... | 3 | 6 | 0 |
| **Gonda** | ... | 3 | 6 | 0 |
| **Agra** | ... | 3 | 6 | 0 |
| **Fatehpur** | ... | 3 | 6 | 0 |
| **Basti** | ... | 3 | 6 | 0 |
| **Budaun** | ... | 3 | 6 | 0 |
| **Bijnor** | ... | 3 | 6 | 0 |
| **Jaunpur** | ... | 4 | 6 | 0 |
| **Benares** | ... | 4 | 6 | 0 |
| **Ghazipur** | ... | 3 | 6 | 0 |
| **Pilibhit** | ... | 2 | 14 | 0 |
| **Banda** | ... | 3 | 6 | 0 |
| **Saharanpur** | ... | 3 | 6 | 0 |

*Apply to the SUPERINTENDENT,*

*Government Press, Allahabad.*

court reversed the decree and dismissed the suit The plaintiff appealed to the High Court and on the case coming on for hearing before Richards, J, his lordship referred the case to a Bench of two Judges on the 1st of June 1909 The case then came up for hearing before a Division Bench

Munshi *Gulzari Lal*, for the appellant, submitted that Musammat Shibbo got only a daughter's estate, and so, as she had not succeeded to the full occupancy rights according to the Hindu Law, section 22 of the new Agra Tenancy Act did not apply

Babu *Benode Behari*, for the respondents, submitted that the Agra Tenancy Act laid down a specific rule of succession The person succeeding gets an absolute estate Musammat Shibbo consequently got an absolute estate

Munshi *Gulzari Lal*, in reply, cited Mayne's Hindu Law, pages 760 to 762 and page 822, and *Doulut Kooer* v. *Burmadeo* (1)

RICHARDS and TUDBALL, JJ —The question involved in this appeal is a right of succession to an occupancy holding One Thakuri died some twenty five years ago without male issue leaving him surviving two daughters, Musammat Shibbo and Musammat Dulari Musammat Shibbo was indigent while Musammat Dulari was affluent Musammat Shibbo succeeded to the holding, and it has been held by the court below that her succession to the holding was under the provisions of the Hindu Law, that the indigent sister takes in priority to the affluent sister. Musammat Shibbo's succession was prior to the coming into force of the present Agra Tenancy Act Musammat Shibbo lived until 1906, when she died, leaving her surviving her sons, the defendants, and her sister, Musammat Dulari, the plaintiff Section 22 of the Tenancy Act purports to provide for the devolution of an occupancy holding, and if the estate of Musammat Shibbo was that of a full occupancy tenant within the meaning of the section, then there is no doubt that the holding would devolve upon her death on her sons Musammat Dulari, the plaintiff, however, contends that Musammat Shibbo had only a daughter's estate, that is, a restricted life estate in the holding, which came to

(1) (1874) 14 B L R 246

# THE INDIAN LAW REPORTS.

*Published in FOUR SERIES viz —*

CALCUTTA, MADRAS, BOMBAY AND ALLAHABAD

---

THE Indian Law Reports, published under the authority of the Governor General in are printed in monthly parts, which are issued, as soon as possible after the first of each

Persons desiring to subscribe for or purchase the reports should apply to—
the Officer in charge, Bengal Secretariat Book Dépôt, Calcutta, or
the Superintendent, Government Press, Madras or
the Superintendent, Government Central Press, Bombay, or

THE CURATOR OF GOVERNMENT BOOKS, United Provinces, Allahabad.

## PRICES.

The terms of subscription, and the terms on which current issues and back numbers as follows —

| | Without postage | With Indian postage | With Fo[reign] postag[e] |
|---|---|---|---|
| | Rs a. p | Rs a p | Rs a |
| COMPLETE SERIES— | | | |
| Current issues, per annum ... ... | | 22 8 0 | 28 0 |
| Back numbers, per annum | 20 0 0 | 22 8 0 | 28 0 |
| CALCUTTA SERIES— | | | |
| Current issues, or back numbers, per annum | 10 0 0 | 12 8 0 | 14 0 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | | |
| Current issues or back numbers per annum | 6 0 0 | 7 0 0 | 8 0 |
| ANY MONTHLY PART— | | | |
| Calcutta Series | 2 0 0 | 2 0 0 | 2 0 |
| Madras Bombay or Allahabad Series | 1 0 0 | 1 0 0 | 1 0 |

*All payments must be made in advance* Remittances to Calcutta should be addresse[d] TREASURER, BENGAL SECRETARIAT, *Writers' Buildings, Calcutta*

## PARTS OUT OF STOCK AND DUPLICATE COPIES

WHEN a requisition is received for any set of the reports, and any Parts are out of st[ock] following deduction from the foregoing rates is made for such Parts —

| | Without postage | With Indian [postage] |
|---|---|---|
| | Rs a. p | Rs a [p] |
| CALCUTTA SERIES | | |
| All Parts for one year ... | 7 12 6 | 8 8 |
| Any one Part ... | 0 8 9 | 0 10 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | |
| All Parts for one year ... | 4 4 0 | 4 11 |
| Any one Part ... | 0 5 3 | 0 5 |

If any Part is lost in transit to a subscriber, and the fact is reported to the office of d[espatch] within three months from the date of publication, a duplicate will be supplied at the following

| | Without postage | With Indian [postage] |
|---|---|---|
| | Rs a p | Rs a |
| CALCUTTA SERIES | 0 8 9 | 0 10 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES | 0 5 3 | 0 5 |

## REPRINTS

THE Complete Series for the years 1878, 1879, 1880, 1883, 1884 ... 1886, 1888, 1889 189[.] 1894, 1895, 1896, 1897, 1898, 1899, 1901 1903, and 1905 to 1909 has been reprinted and purchased at the Bengal Secretariat Book Dépôt, Calcutta, either wholly or in part. All required to complete the stock of the Reports for other years are now being reprinted. Reports from the beginning to date will therefore shortly be available at the Bengal Book Dépôt.

## ADVERTISEMENT FOR THE CALCUTTA SERIES

ADVERTISEMENTS of law publications only are received Rates can be ascertained on appl[ication] to the Bengal Secretariat Book Dépôt

the credit of her deceased husband Notice was issued to the defendants, who were the next reversioners They put in an K
application as follows —

"The petitioners do not object to the lady's enjoying R
the interest on this money, but as Musammat Ram Kuar has only a life interest and has no right to appropriate the corpus except for legal necessity, it is desirable that some orders should be passed for safeguarding the interests of the reversioners."

Upon this application the District Judge, Mr B J Dalal, passed the following order —

"The objection is reasonable The applicant's pleader states that the applicant cannot give security

"I therefore empower the applicant only to receive interest on the money deposited in the Allahabad Bank, under section 8(*a*) of the Succession Certificate Act A certificate shall be made out in the applicant's name in that form for the debt entered in the application"

The plaintiff, Musammat Ram Kuar, then brought the present suit in the court of the Subordinate Judge asking for the following reliefs —

"(*a*) that the order of the District Judge in the Succession Certificate case be set aside,

(*b*) that she may be declared to be fully entitled to realize the whole amount held by the Allahabad Bank"

The defendants pleaded that inasmuch as they had never denied her title, there was no cause of action for the suit Both the courts below refused to set aside the order of the District Judge in the succession certificate case, but gave the plaintiff a decree for the other declaration asked for The defendants appealed

Babu *Pcary Lal Banerji*, for the appellant —

A declaratory suit is governed by the provisions of section 42 of the Specific Relief Act and two things are essential before such a suit is maintainable First, an allegation by the plaintiff that she was entitled to a legal character or right, and second, that the defendant was denying or was entered to deny such character or right. A suit for a declaration of an abstract right was not

The Bombay Code, Vol. I, Third Edition, 1907 ... ... Rs. 4. (8 a.)
Ditto Vol. II, Third Edition, 1907 ... ... ... Rs. 6. (8 a.)
Ditto Vol. III, Third Edition, 1908 ... ... Rs. 5. (8 a.)
Ditto Vol. IV, Third Edition, 1909 ... ... Rs. 4. (8 a.)
Volumes I to IV. Reduced to Rs. 11 per set.
The Coorg Code, Third Edition, 1908 ... ... ... Rs. 2. (4 a)
E. B. & Assam Code, Vol. I, Edition, 1907 ... ... ... Rs. 6. (10 a.)
Ditto Vol. II, Edition 1907 ... ... ... Rs. 6. (9 a)
Ditto Vol. III, Edition, 1907 ... ... ... Rs. 6. (9 a.)
Volumes I to III reduced to Rs. 10 per set.
The United Provinces Code, Vol. I, Fourth Edition, 1906, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table ... ... Rs. 5. (8 a.)
The United Provinces Code, Vol. II, Fourth Edition, 1906, consisting of the Acts of the Lieutenant-Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in, or extended to, the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874, with an Index Rs. 10 (Re. 1) for both Vols. or Rs. 5 (8a.) for each Volume.
The United Provinces Code, Vols. I and II reduced to Rs. 7 per set.

*In the Press.*

A new edition of the Burma Code.

## II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INI IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION.

Act I of 1846 (Legal Practitioners), as modified up to 1st October, 1907 ... ... ... ... ... 2 a. (1 a.)
Act XXI of 1850 (Removal of Caste Disabilities) with foot-notes ... 1 a. 6 p. (1 a.)
Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August, 1908 ... ... ... ... ... 11 a (1 a)
Act XXX of 1852 (Naturalization of Aliens), as modified up to 30th April, 1908 ... ... ... ... ... 2 a. (1 a.)
Act XX of 1853 (Legal Practitioners), as modified up to 1st September, 1907 ... ... ... ... ... 1 a. 9 p. (1 a.)
Act XXIV of 1854 (Malabar War—Knives) with foot-notes ... 1 a. 3 p. (1 a)
Act XXIII of 1855 (Administration of mortgaged Estates), as modified up to 1st October, 1908 ... ... ... ... 1 a. 3 p. (1 a.)
Act XXIV of 1855 (Penal Servitude), as modified up to 1st January, 1909 ... ... ... ... ... 2 a. (1 a)
Act XIII of 1857 (Opium), as modified up to 1st August, 1908 ... 4 a. 3 p. (1 a)
Act XXVII of 1857 (Madras University), with foot-notes ... ... 2 a. 0 p. (1 a.)
Act IX of 1859 (Forfeiture), as modified up to 1st October 1908 ... 1 a. 9 p. (1 a.)
Act XXIV of 1859 (Madras District Police), as modified up to 1st November, 1907 ... ... ... ... ... 3 a. 6 p. (2 a.)
Act XVI of 1863 (Excise Duty on Spirits), as modified up to 1st October, 1908 ... ... ... ... ... 2 a. (1 a)
Act XXXI of 1863 (Gazette of India) with footnotes ... ... 1 a. 3 p. (1 a)
Act XV of 1862 [illegible] as modified up to 30th June, 1909 ... 1 a. 9 p (1 a)
Act X of 1865 (Succession), as modified up to 1st April, 19[illegible] ... Rs. 1 9 (2 a.)
Act XXII of 1867 (Sarais and Paraos) as modified up to 1st August, 19[illegible] ... ... ... ... ... 2 a (1 a)
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 19[illegible] ... ... ... ... 5 a. (1 a)

District Judge of Allahabad in the succession certificate case, might be set aside. The courts below have granted her the reliefs she claimed with the exception that they declined to set aside the order of the District Judge It is contended in appeal here that as the appellants had never denied the right or legal character of the respondent Musammat Ram Kuar, she was not entitled to a declaration of an abstract right The contention is that the lady should have appealed from the order of the District Judge refusing her a certificate to realize the whole amount, and that she has no cause of action for this declaratory suit, inasmuch as the appellants have never denied her title It was, however, due to the appellants' action in the succession certificate case that limitations were placed upon the power of the lady Musammat Ram Kuar to recover the deposit from the Bank We are of opinion that this order gave the lady a right to bring the present suit We dismiss the appeal with costs

*Appeal dismissed*

---

*Before Sir John Stanley, Knight Chief Justice, and Mr Justice Banerji*

MASUM UN NISSA (PLAINTIFF) *v* LATIFAN AND OTHERS (DEFENDANTS) *

*Civil Procedure Code* (1882) *section* 396—*Partition—Preliminary decree in plaintiff's favour—Resistance to commissioner—Refusal of plaintiff's application for reissue of commission*

A preliminary decree for partition of a house having been made the court appointed a commissioner to view the house and prepare a scheme for partition In this he was resisted by the husband of the plaintiff and was unable to execute the commission The plaintiff applied for the issue of a fresh commission but the court refused this and dismissed the suit altogether *Held* that the court had no authority to nullify its decree by totally dismissing the suit but ought to have acceded to the request of the plaintiff to reissue the commission and to have seen that its order was obeyed

THIS was an appeal under section 10 of the Letters Patent against a judgement of GRIFFIN, J The facts of the case appear from the judgement under appeal, which was as follows —

Plaintiff's suit was for possession by partition of certain shares in two houses By an order dated 19th September, 1906 the court of first instance decreed plaintiff's claim for partition and separate possession over 30 *sihams* out of 96 *sihams* A decree was prepared in accordance with that judgement In the same order it was directed that a commission will issue to the amin to draw up proposals for the partition and he was directed to submit his report before 31st October 1906 From the amin's report it appeared that the plaintiff refused to

* Appeal No 65 of 1908 under section 10 of the Letters Patent

Act XVI of 1890 (Northern India Canal and Drainage) with foot notes 1 *a* (1 *a*)

Act X of 1904 (Co operative Credit Societies) with reference to rules under the Act .. 5 *a* 6 *p* (1 *a*)

Regulation III of 1818 (Bengal State Prisoners Regulation) as modified up to 1st August 1909 2 *a* 9 *p* (1 *a*)

Regulation I of 1890 (British Baluchistan Laws Regulation) as modified up to 1st June 1909 3 *p* (1 *a*)

## III —ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN AS ORIGINALLY PASSED

Acts (Unrepealed) of the Governor General of India in Council from 1907 up to date

Regulations made under the Statute 33 Vict, Cap 3 from 1907 up to date

The above may be obtained separately The price is noted on each ]

## IV —TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL INDIA IN COUNCIL

| | | |
|---|---|---|
| Act XXI of 1850 (Caste Disabilities) with foot notes | In Urdu | 3 *p* (1 *a*) |
| Ditto ditto | In Hindi | 3 *p* (1 *a*) |
| Act XXXVII of 1850 (Public Servants Inquiries) as modified up to 1st August 1908 .. | In Urdu | 9 *p* (1 *a*) |
| Ditto ditto | In Nagri | 9 *p* (1 *a*) |
| Act XIII of 1857 (Opium) as modified up to 1st August 1908 | In Urdu | 9 *p* (1 *a*) |
| Ditto ditto | In Nagri | 9 *p* (1 *a*) |
| Act IX of 1859 (Forfeiture) as modified up to 1st October 1908 | In Urdu | 3 *p* (1 *a*) |
| Ditto ditto | In Nagri | 3 *p* (1 *a*) |
| Act XVI of 1863 (Excise) as modified up to 1st October 1908 | In Urdu | 3 *p* (1 *a*) |
| Ditto ditto | In Nagri | 3 *p* (1 *a*) |
| Act XXXI of 1863 (Official Gazette) with footnotes .. | In Urdu | 3 *p* (1 *a*) |
| Ditto ditto | In Nagri | 3 *p* (1 *a*) |
| Act XV of 1864 (Indian Tolls) as modified up to 30th June 1909 | In Urdu | 3 *p* (1 *a*) |
| Ditto ditto | In Nagri | 3 *p* (1 *a*) |
| Act X of 1865 (Succession) as modified up to 1st April 1909 | In Urdu | 11 *a* 3 *p* (2 *a*) |
| Ditto ditto | In Nagri | 11 *a* 3 *p* (2 *a*) |
| Act XXII of 1867 (Sarais and Paraos) as modified up to 1st August, 1908 | In Urdu | 6 *p* (1 *a*) |
| Ditto ditto .. | In Nagri | 6 *p* (1 *a*) |
| Act XXV of 1867 (Press and Registration of Books) as modified up to 1st October 1907 | In Urdu | 1 *a* 3 *p* (1 *a*) |
| Ditto ditto | In Nagri | 1 *a* 3 *p* (1 *a*) |
| Act V of 1870 (Unclaimed Deposits) as modified up to 1st October, 1908 .. | In Nagri | 3 *p* (1 *a*) |
| Act VII of 1870 (Court fees) as modified up to 1st February 1909 | In Urdu | 5 *a* 9 *p* (1 *a*) |
| Ditto ditto .. | In Nagri | 5 *a* 6 *p* (1 *a*) |
| Act XXVII of 1871 (Criminal Tribes) as modified up to 1st September 1909 .. | In Urdu | 1 *a* 3 *p* (1 *a*) |
| Ditto ditto .. | In Nagri | 1 *a* 3 *p* (1 *a*) |
| Act I of 1872 (Evidence) as modified up to 1st May 1909 | In Urdu | 6 *a* (2 *a*) |
| Ditto ditto | In Nagri | 6 *a* (2 *a*) |
| Act I of 1878 (Opium) as modified up to 1st October 1907 .. | In Urdu | 1 *a* 6 *p* (1 *a*) |
| Ditto ditto | In Nagri | 1 *a* 6 *p* (1 *a*) |
| Act XII of 1880 (Kazis) with footnotes | In Urdu | 3 *p* (1 *a*) |
| Act II of 1882 (Trusts) as modified up to 1st June 1909 .. .. | In Nagri | 3 *a* 6 *p* (1 *a*) |
| Act XIII of 1889 (Cantonments) as modified up to 1st October 1907 .. .. | In Urdu | 3 *a* (1 *a* 0 *p*) |

We are of opinion that this appeal must prevail. As we have stated above, the Munsif made a decree on the 19th of September, 1906. He ought to have carried out that decree, and with that view, he should, in accordance with the provisions of section 396 of Act XIV of 1882, have issued a commission and made a decree after considering the report of the commissioner. The circumstance of the plaintiff or her agent having resisted the commissioner was not sufficient to justify the dismissal of the suit in its entirety. The court ought to have acceded to the request of the plaintiff's pleader to re-issue the commission and to have seen that the order was obeyed. As the court had passed a preliminary decree, decreeing a part of the claim, it had no authority to nullify that decree by totally dismissing the suit. We allow the appeal, discharge the decrees of this Court, of the lower appellate court and of the court of first instance, and send the case back to the court of first instance with directions to carry out the decree of September 1906. Costs here and hitherto will follow the event.

*Appeal decreed and cause remanded.*

---

*Before Mr. Justice Richards and Mr. Justice Tudball.*

SHEO PARGASH SINGH AND OTHERS (PLAINTIFFS) *v.* NAWAB SINGH AND OTHERS (DEFENDANTS).*

*Code of Civil Procedure* (1882), *section 244—Execution of decree—Interpretation.*

***Held*** that section 244 of the Code of Civil Procedure (1882) does not apply to a dispute between the decree-holder and a person against whom though a party to the suit no decree has been passed. *Kalka Prasad* v. *Basant Ram* (1) followed.

THE facts of this case were as follows:—

On the 2nd of June, 1866, Raghunandan, Jhumak, Bachu Lal and Padam Nath Saran Sigh, mortgaged (usufructuarily) certain property to Jeo Lal and Subh Dayal. On the 15th of December, 1869, the mortgagees sold their rights to Jhumak and Padam Nath Saran Singh. Ambika, the son of Jhumak, and Padam Nath Saran Singh mortgaged certain property including the mortgagee rights of Bachu Lal, to the defendants 1 to 11, and in 1897 these defendants obtained a decree for sale and in execution of that decree they themselves purchased the property. The representatives of

---

* Second Appeal No. 101_ of 1908 from a decree of Sri Lal, District Judge of Ghazipur, dated the 30th of June 1908, reversing a decree of Kalka Singh, Munsif of Ballia, dated the _th of February 1908.

(1) (1901) I. L. R. 23 All. 346.

## V.—MISCELLANEOUS PUBLICATIONS.

Table showing Effect of Legislation in the Governor General's Council during 1906 ... ... ... ... ... 3 *a* 6 *p.* (1 *a*)

Ditto ditto 1907 ... 2 *a.* 6 *p* (1 *a*)

Volume IV in the Press

Title page and Contents of the Acts passed by the Governor General of India in Council in the year 1907 .. ... 1 *a* 6 *p* (1 *a*)

Ditto ditto 1908 ... .. 5 *a* 9 *p* (1 *a*)

Ditto ditto 1909 . .. 8 *a* 3 *p* (1 *a*)

their mortgagee rights in the share of Bachu Lal Singh The defendants Nos 1 to 11 brought two suits for sale on the basis of their mortgages in the year 1897 At that time Bachu Lal Singh was dead and the widow Lakhraji Kunwar was made a party to the suits as having an interest in the mortgaged property At the date of those suits her interest was the equity of redemption under the mortgage of the 2nd of June, 1866, as the widow of the original mortgagor She was not indebted in any way to the defendants Nos 1 to 11 under the mortgages in their favour By their suit they asked for decrees for sale in respect of the mortgagee rights of Ambika and Padam Nath Saran Singh in the share of Bachu Lal Singh As against Lakhraji and her interest they sought for no relief and this was distinctly stated by their pleader in the course of the suit Judgement was passed in their favour ordering the payment to them of sums due on their mortgages and in default ordering the sale of the mortgaged property, that is, so far as we are concerned in this case, the sale of the mortgagee rights held by Ambika and Padam Nath Saran Singh The decrees drawn up on the basis of the judgement in the two suits were drawn in a very unsatisfactory manner On behalf of the respondents it is urged that those decrees were decrees for the sale of the full proprietary rights in the share of Bachu Lal Singh On behalf of the appellants it is urged that the decrees are merely decrees for the sale of the mortgagee rights of Jhumak Singh and Padam Nath Saran Singh Reading those decrees, however, as a whole and taking into consideration the fact that in the details of the property ordered to be sold the property sub mortgaged in those villages is distinctly mentioned, there can be no doubt that the true interpretation of the decrees is that they were for the sale of the mortgagee rights so far as the particular property in dispute is concerned This interpretation is consistent with the judgement, and in the case of an ambiguity if it is possible to read the decree consistently with the judgement this should be done In execution of the e decrees the re pondents purchased the property sold The sale certificate, dated the 20th March 1903, shows that what was sold in auction appears to be comprehensive enough to include the proprietary title of Bachu Lal Singh in the share now in dispute, that is to say, it appears to indicate that

their mortgagee rights in the share of Bachu Lal Singh The defendants Nos 1 to 11 brought two suits for sale on the basis of their mortgages in the year 1897 At that time Bachu Lal Singh was dead and the widow Lakhraji Kunwar was made a party to the suits as having an interest in the mortgaged property At the date of those suits her interest was the equity of redemption under the mortgage of the 2nd of June, 1866, as the widow of the original mortgagor She was not indebted in any way to the defendants Nos 1 to 11 under the mortgages in their favour By their suit they asked for decrees for sale in respect of the mortgagee rights of Ambika and Padam Nath Saran Singh in the share of Bachu Lal Singh As against Lakhraji and her interest they sought for no relief and this was distinctly stated by their pleader in the course of the suit Judgement was passed in their favour ordering the payment to them of sums due on their mortgages and in default ordering the sale of the mortgaged property, that is, so far as we are concerned in this case, the sale of the mortgagee rights held by Ambika and Padam Nath Saran Singh The decrees drawn up on the basis of the judgement in the two suits were drawn in a very unsatisfactory manner On behalf of the respondents it is urged that those decrees were decrees for the sale of the full proprietary rights in the share of Bachu Lal Singh On behalf of the appellants it is urged that the decrees are merely decrees for the sale of the mortgagee rights of Jhumak Singh and Padam Nath Saran Singh Reading those decrees, however, as a whole and taking into consideration the fact that in the details of the property ordered to be sold the property sub mortgaged in those villages is distinctly mentioned, there can be no doubt that the true interpretation of the decrees is that they were for the sale of the mortgagee rights so far as the particular property in dispute is concerned This interpretation is consistent with the judgement, and in the case of an ambiguity if it is possible to read the decree consistently with the judgement this should be done In execution of those decrees the respondents purchased the property sold The sale certificate, dated the 20th March 1903, shows that what was sold in auction appears to be comprehensive enough to include the proprietary title of Bachu Lal Singh in the share now in dispute, that is to say, it appears to indicate that

which has now arisen, namely, whether her interest had been improperly sold or not by the decree-holder. In this view the plaintiffs are entitled to redeem.

At the conclusion of the judgement we are asked to consider the first ground entered in the memorandum of appeal to the lower appellate court. It appears that in the court of first instance a plea practically of no substance was raised that Bachu Lal Singh was a member of the joint undivided Hindu family with Jhumak Singh and Padam Nath Saran Singh. No issue was framed on this point and from the statement made by the respondents' pleader in that court it appears sufficiently clear that the point was not pressed in that court. The mortgage deed of the 2nd June 1866 itself, the fact that the shares were separately redeemed, and the fact that Jhumak Singh mortgaged his rights as mortgagee of that very share, all go to show that there is no substance whatsoever in this plea. We do not deem it necessary to remit any issue for a finding on this point. The result is that we set aside the decree of the lower appellate court and reinstate that of the court of first instance with costs.

*Appeal decreed.*

## FULL BENCH.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Piggott.*

NANDAN PRASAD (PLAINTIFF) *v.* AJUDHIA PRASAD (DEFENDANT).*

*Act No. IX of 1872 (Indian Contract Act), section 68—Minor—Necessaries—Hindu law—Joint Hindu family—Money borrowed to defray expenses of sister's marriage.*

One of the brothers in a joint Hindu family consisting of two brothers and a sister, all minors, the sister being about 13 years of age, borrowed a sum of money to provide for the expenses of the sister's marriage. After the death of the borrower the lender sued the surviving brother to recover the sum so advanced from the property of the joint family in his hands. *Held* that the suit was maintainable notwithstanding that the decreased brother was a minor at the time that the money was advanced. *Tulsha v. Gopal Rai* (1)

* [illegible] David, Judge of the [illegible] Judge at Cawnpore [illegible] Pirthi Nath, Munsif of

(1) (1884) I. L. R., 6 All. 632.

entitled to be reimbursed. Brij Behari and Ajudhia Prasad were equally bound to meet the marriage expenses of their sister. The loan was advanced to the family and was not a personal loan to a minor member. Referring to the Indian Contract Act, section 11, he submitted that the words used therein were limited to a contract and should not be extended to cases other than those of a contract. He contended that the case was covered by section 68 of the Contract Act. The word "necessaries" need not mean in India what it did in England. It did not mean merely personal necessaries. Illustration *(b)* to section 68, made it clear that the 'necessaries' might be the necessaries of the minor or of those whom the minor was bound to support. Further, he submitted that the Indian Contract Act was not exhaustive. He referred to *Irrawaddy Flotilla Co.* v. *Bugwandas* (1)

Babu *Durga Charan Banerji* (for the Hon'ble Pandit *Moti Lal Nehru*) submitted that legal necessity did not mean the same thing as necessaries in section 68, Indian Contract Act. He submitted that it was the case of a loan. Brij Behari was a minor. The loan was advanced to a minor and so it was absolutely void. The family in a case like the present would only be liable if the member who borrowed was competent to contract. The plaintiff had to make out that it was a case for 'necessaries'. The word 'necessaries' had been defined in several Indian and English cases and must be construed accordingly. The necessaries must be the 'necessaries' of an infant and the question was whether the money was advanced to Brij Behari for his 'necessaries.' Then again, the plaintiff's remedy, if any, lay against the person or property of Brij Behari, to whom the money was advanced. The property now in the hands of Ajudhia Prasad came to him by survivorship and not *by way of inheritance from Brij Behari.* The girl or her guardian could not bring a suit to get her marriage expenses raised out of the family property. He referred to *Jagon Ram Marwari* v. *Mahadeo* (2).

Dr. *Tej Bahadur Sapru*, in reply, cited Leake on *Contracts*, p. 380, Chitty on Contracts, p. 146 (Ed. 1904), *Chapple* v. *Cooper*, (3) and Banerjee on Marriage and Stridhan, pp. 42 and 43.

(1) (1891) I. L. R., 18 Calc., 620, 623, 629. (2) (1909) I. L. R., 36 Calc., 768, 774
(3) (1844) 13 M. and W., 252

220 of the ninth Edition The authors quote from an English case, *Chapple* v. *Cooper* (1), where it is laid down that —

'Things necessary are those without which an individual cannot reasonably exist In the first place food raiment lodging and the like Again .. . instruction in art or trade or intellectual moral and religious information may be a necessary also Again, as man lives in society, the assistance and attendance of others may be necessary to his well being Hence attendance may be the subject of an infant's contract Then *the classes being established* the subject matter and extent of the contract may vary according to the state and condition of the infant himself But in all these cases it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor Contracts for charitable assistance to others, though highly to be praised cannot be allowed to be binding because they do not relate to his own personal advantage

The essential difficulty of the present case lies in the application of the principle of law based upon English decisions to the widely different conditions of Indian society Nor can the principle itself be considered altogether apart from those provisions of Hindu law which bear upon the devolution of property in a Hindu joint family and the duties and liabilities of the members of such family *inter se* This became clearly apparent in the course of the argument, when it was urged upon us on behalf of the respondent that the plaintiff could in no case recover anything from Ajudhia Prasad, because his remedy (if any) lay against the estate of the minor, Brij Behari Lal, to whom the money was advanced, and the family property was now in the hands of Ajudhia Prasad by survivorship, and not by inheritance from Brij Behari Lal I am satisfied that this argument is adequately met by the rejoinder that the loan was made to Brij Behari Lal as manager of the joint family, that it was virtually a loan to the family itself, and that Ajudhia Prasad was as much liable as his elder brother for the provision of the necessary expenses of the sister's marriage But if the question is thus complicated in one of its aspects by considerations arising out of Hindu law, it seems to me that we must be careful to bear in mind the principles of the same law, when we come to apply the doctrines laid down in English cases on the subject of

(1) (1844) 13 M and W, 252

as regards Brij Behari Lal himself, it can fairly be said that any further postponement of his sister's marriage would have involved him in a considerable degree of social discredit, that its postponement for another two years might have made it difficult to effect the marriage at all and that the social discredit in that case would have been serious There was thus an element of urgency about the matter even as regards Brij Behari Lal himself On the whole, therefore, I am of opinion, that, though the present case is one very near the boundary line, it may fairly be said that the provision of the reasonable expenses for Musammat Genda Bibi's marriage was at the time when the loan in question was taken, a matter of necessity for her minor brother

I would therefore accept this appeal set aside the decree of the lower appellate court and restore that of the court of first instance

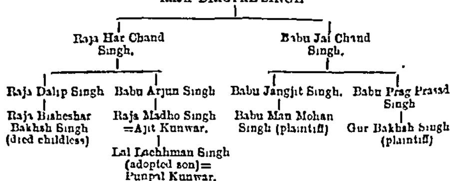
STANLEY, C J —I also am of opinion that the plaintiff is entitled to recover out of the ancestral property in the hands of the defendant the amount of the money advanced by Salig Ram, as also the value of the goods supplied by him for the marriage of the defendant's sister, Musammat Genda Bibi At the time of her marriage Genda Bibi was of marriageable age and it would have been a disgrace to the family if she had not been married At the time of her marriage the joint family consisted of Brij Behari, the defendant Ajudhia Prasad and their sister, Genda Bibi Musammat Sumitra, the mother of these three persons had been the certificated guardian of Brij Behari and Ajudhia Prasad, but she died before the marriage of Genda Bibi Brij Behari was the elder of the two brothers, and he managed the affairs of the family after the death of Musammat Sumitra The moneys and goods supplied by Salig Ram were entered in the account books of the family, and it has been found that the sum of Rs 566-7-9 was provided by Salig Ram for the marriage expenses The court of first instance gave a decree for this amount with interest, but upon appeal the learned Judge of the Court of Small Causes at Cawnpore set aside the decree of the court of first instance and dismissed the plaintiff's suit on the ground that the money

stating that he had by a deed of will on 26th May, 1883, appointed his adopted son as his successor to the whole of his property, and that it had become necessary to alter some of the provisions of that deed), declared that it was written "by way of deed of adoption and codicil to a will," and that he had made over the whole of the property in suit to his adopted son, and had absolutely and unconditionally relinquished all right and proprietorship as well as ceased interference with the property. In a subsequent clause he described the person in whose favour the deed was made as "my adopted son and donee and legatee under the deed dated the 26th May, 1883, as well as under this deed..........in respect of all my movable and immovable property which has already been acquired, or which may be acquired hereafter during my lifetime or which may come to me by inheritance, or to which I may become entitled."

*Held* (affirming the decision of the Court of the Judicial Commissioner) that on a consideration of the provisions of the deed, and of the circumstances which led up to its execution, it was testamentary in character, and could not be construed as a gift *inter vivos* to the appellant's predecessor in title, who predeceased his adoptive father. In styling him "donee" the deed referred simply to what was given him by the deed and codicil.

APPEAL from a judgment and decree (27th November 1906) of the Court of the Judicial Commissioner of Oudh, which affirmed a decree (29th March 1905 of the Court of the Subordinate Judge of Lucknow, dismissing the suit of the predecessor in title of the first appellant.

The matter in dispute in the suit out of which this appeal arose was the succession to the taluqa of Amethi in the province of Oudh. The following pedigree shows the position of the parties and the persons through whom they claimed :—




The Amethi taluqa was owned by Raja Madho Singh mentioned in the pedigree, whose name appeared as taluqdar in lists 1 and 2 prepared under section 8 of the Oudh Estates Act (I of 1869). In 1883 Raja Madho Singh adopted a kinsman, Lachhman Singh, and in 1886 put him in possession of the taluqa after

suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person Brij Behari and Ajudhia Prasad were under a legal obligation not merely to maintain their sister, but also to provide for the expenses of her marriage, and being under age were incapable of entering into a contract It was as much obligatory upon them to provide for the expenses of their sister's marriage as it is obligatory upon a lunatic to supply his wife and children with necessaries suitable to their condition in life If a party supply the wife and children of a lunatic with such necessaries, he is entitled, under the illustration appended to section 68, to be reimbursed from the lunatic's property So here, as it appears to me, Salig Ram having supplied Brij Behari and Ajudhia Prasad with what was requisite for the marriage of their sister is entitled to be reimbursed out of the family property The term "necessaries" is comprehensive and is not confined to necessaries for the person of the infant himself, but may extend to necessary things provided for other members of his family It would have been open to Musammat Genda to institute a suit to have her marriage expenses provided out of the family estate Such a suit would have involved the defendant and his brother in unnecessary costs This has been avoided In the case of *Sham Charan Mal* v *Chowdhry Debya Singh* (1) it was held by Ghosh and Gordon, JJ, that money supplied to a minor to provide for his defence in criminal proceedings pending against him on a charge of dacoity and used by him for that purpose, must be taken to have been advanced for necessaries within the meaning of section 68 of the Indian Contract Act The learned Judges in their judgement say that "the liberty of the minor being at stake we think the money should be taken to have been borrowed for necessaries" In *Chapple* v *Cooper* (2) it was held that an infant widow was bound by her contract for the furnishing of the funeral of her husband who had left no assets Alderson, B, in his judgement in that case quoted the following words of Lord Bacon —"If a man under the years of 21

(1) (1894) I. L. R., 21 Calc., 872. (2) (1844) 13 M. and W., 252.

to the preservation of her honour and chastity and should any woman, except the Rani whose name is given below claim to be my wife and does no produce a registered document from me then such woman will not be entitled to any allowance from my estate The name of the Rani Sahiba is this Rani Ajit Kunwar Sahiba

'Eighthly the stipulations (*sharait*) of the deed of May 26th, 1883 so far as they are inconsistent with this last deed are hereby (*lit* by this instrument) amended but there shall be no change in the essential facts (*amar lit* fact) namely, the fact of appointment as successor to the property and the fac of adoption which have been accomplished from before (*pahle se ho chuka ha*) and Lal Lachhman Singh will be—as my adopted son and donee (*mauhub lahu*) and legatee (*musi lahu*) under the deed dated the 26th May 1883 as well as under this deed—(my) full (*mukammal*) successor and will be entitled to all rights—legal customary and *shastric*—in respect of all my movable and immovable property, which has already been acquired or which may be acquired hereafter during my life time or which may come to me by inheritance or to which I may become entitled Therefore while in a state of sound health and sound mind and sense I have of my free will and of my own motion written this deed by way of a deed of adoption and codicil to a will in order to amend and rectify (*islah*) the deed of 26th May 1883 by adding some necessary provisions to it so that it may remain on record '

Lachhman Singh died intestate and without issue on 12th April, 1891, in the lifetime of Raja Madho Singh He left surviving him his widow Rani Punpal Kunwar, and his mother Rani Ajit Kunwar The former succeeded to a life estate in the Amethi taluqa and died on 10th August, 1893 She was succeeded by Rani Ajit Kunwar who died on 17th December, 1893 when the succession opened out

Raja Madho Singh died on 24th August, 1891, but before his death he made a will, dated 1st May, 1891, by which he left his property to Raja Bhagwan Bhakhsh Singh, the first respondent, who obtained possession thereof after Raja Madho Singh's death When the succession opened out on the death of Rani Ajit Kunwar in 1893, Babu Prag Prasad Singh became entitled to the Amethi taluqa, and on his death in 1894 his rights passed to his son Gur Bakhsh Singh, the first plaintiff, who is now represented by his son the first appellant, a minor

The suit out of which this appeal arose was instituted on 22nd August 1903, by Gur Bakhsh Singh and the transferee of portions of the taluqa against Raja Bhagwan Bakhsh Singh as principal defendant, and now the only respondent contesting the appeal The plaint recited the facts above set out, stated that since the

# REVISIONAL CIVIL

*Before Mr Justice Sir George Knox and Mr. Justice Karamat Husain*

BISMILLA BEGAM (APPLICANT) v TAWASSUL HUSAIN (OPPOSITE PARTY) *

*Act No VII of 1889 (Succession Certificate Act), sections 4 and 7—Certificate not to be given for collection of part only of a debt—Muhammadan law—Dower.*

*Held* that no certificate could be granted to one of the heirs of a Muhammadan lady, who had died leaving a dower debt unrealized, for collection merely of a part of the dower debt of the deceased *Muhammad Ali Khan* v. *Puttan Bibi*, (1) followed *Akbar Khan* v *Bilkisara Begam* (2) referred to

THE facts of this case were as follows :—

Niaz Banu Begam was married to Tawassul Husain The dower fixed was Rs 57,000 and was deferred Niaz Banu Begam died on the 5th of November, 1908, leaving as heirs her husband, her mother, and her uncle's son The mother was entitled to Rs. 17,000 out of the dower money. She relinquished (orally) claim to that amount except to Rs 800 out of the total. Having abandoned her claim to Rs 16,200, she applied for a succession certificate for Rs. 800 Tawassul Husain, the husband of deceased, objected to the application on several grounds, *inter alia* that the applicant could not obtain a succession certificate of a part of the debt only. The Munsif granted the certificate, holding that she was applying for that part of the debt which alone was her share and which she had every right to claim The District Judge reversed the order of the Munsif. The petitioner applied to the High Court for revision of the Judge's order.

Dr. *Tej Bahadur Sapru*, for the applicant, contended that the District Judge acted illegally in refusing to grant the succession certificate. There was nothing in law to prevent an heir from recovering a share of the debt due to the deceased There was no definition of "debt" in the Succession Certificate Act. The rulings in *Muhammad Ali Khan* v. *Puttan Bibi* (1) and *Akbar Khan* v. *Bilkisara Begam* (2) did not apply. The debt due from a husband to his wife was a single debt, and after her death it was split up into three different debts and the shares of the three heirs were defined, and what one heir could claim

* Civil Revision No 62 of 1909

(1) (1895) I. L. R., 19 All., 129 (2) Weekly Notes, 1901, p 125.

but a testamentary instrument. On the first point MR. CHAMIER said :—

"After hearing counsel for the plaintiffs on the question whether a registered document was necessary to effect a transfer of the Raja's property to Lachhman Singh my learned colleague and I were decidedly of opinion that a registered document was necessary We, therefore, did not call upon the respondents to address us upon this point of the case I have nothing to add to what I said on this subject in my judgment in the case of *Chhabraj Kunwar* v. *Gopal Lal* (1) Counsel for both sets of plaintiffs expressly stated that they did not wish to distinguish between Taluqdari and non Taluqdari property, and they admitted that, if the acts of the Raja in 1886 did not transfer the title to the Taluqdari property, they were equally inefficacious as regards the non Taluqdari property It appears to me that the result is the same whether the Oudh Estates Act or the Transfer of Property Act applies I hold, therefore, that Lachhman Singh did not acquire any title to the property of the Raja in 1886"

MR. EVANS said :—

"The first question is as to the construction of sections 13, 16 and 17 of Act I of 1869, as it is contended on behalf of the appellants that a Taluqdari estate can be transferred by an oral gift under the provisions of the Act The question is an important one, because the authority of such an eminent lawyer as Sir Barnes Peacock has been cited in Mr Sykes' compendium of Taluqdari Law as an authority in favour of the contention taken by the appellants I am of opinion that the difficulty which arises in connection with sections 13, 16 and 17 of Act I of 1869 is due to the fact that section 13 precedes sections 16 and 17 when it should have been placed after them in the Act If we read them in the following order the meaning appears clear enough —Section 16 provides that every transfer must be made by an instrument in writing But (1) section 17 provides that, if such transfer be a gift execution of the deed of gift must be followed by delivery of possession within six months after registration, and (2) a further proviso is set forth in section 13 as to deeds of gift or bequests *to a certain class of donees and legatees*, and in such a case the instrument must have been executed more than three months before death of the donor or testator The result is that a certain class of donee or legatee cannot succeed in case of gift or bequest, even if delivery be given, unless the donor or testator lives for more than three months after execution Other classes succeed if the provisions of sections 16 and 17 are complied with, and one of those provisions is that every transfer must be made by an instrument in writing This makes an intelligible law as to transfers but if section 16 is read as *subject to section* 13 as contended for appellants, it appears to me that the law on the subject is reduced to chaos It is to my mind as clear as possible that sections 17 and 13 should be read as provisos to section 16 and not *vice versa* I am satisfied that the law as set forth by a Bench of this Court in *Chhabraj Kunwar* v. *Gopal Lal* (1) is the only interpretation of the law which is intelligible, and any other interpretation would result in hopeless confusion I have no hesitation in holding that it was never

(1) (1906) 9 Oudh Cases, 115.

the father's share in that debt. The Judge before whom the application came declined to grant her the certificate unless the applicant paid the two per cent. duty on the whole debt, namely, the debt of eleven lakhs of rupees. His refusal was supported by this Court, and the learned Judges before whom the appeal came observed that there had been a uniform series of decisions in this Court, according to which a certificate cannot be granted to collect a part only of a debt. We have been referred to no case breaking this uniformity of decisions, with the exception of one case, *Akbar Khan* v. *Bilkisara Begam*. This case has not been reported in the authorized law reports, and we say no more about it than this that the learned Judges, while professing, and one of them with diffidence, to follow the precedent of *Muhammad Ali Khan* v. *Puttan Bibi*, seem, in the conclusion at which they arrived, to have overlooked the real point decided in *Muhammad Ali Khan* v *Puttan Bibi*. We are not prepared to decide otherwise than this Court decided in the case of *Muhammad Ali Khan* v *Puttan Bibi*. Hard cases may arise if parties elect to make applications under the Succession Certificate Act, and this case may be one of such hard cases. But in most, if not in all of them, the difficulty can be avoided, it appears to us, by proceedings taken under the Probate and Administration Act We reject the petition with costs.

*Petition rejected.*

## APPELLATE CIVIL.

*Before Mr Justice Richards and Mr Justice Tudball*

MOHAR SINGH AND OTHERS (DEFENDANTS) *v* HET SINGH (PLAINTIFF) *

*Hindu law—Will—Validity of bequest to complete a temple and instal an idol.*

*Held* that a bequest to complete the building of a temple which had been commenced by the testator and to instal and maintain an idol therein is a valid bequest under the Hindu Law *Bhupati Nath Smrititirtha*, v. *Ram Lal Moitra*, (1) followed.

THIS was an appeal arising out of an application for probate of the will of one Umrao Singh, the material portion of which is set forth in the judgment of the Court The application was opposed by the widows of the testator, as also by one Het Singh,

*First Appeal No. 255 of 1908 from a decree of Jagat Narain, Additional Subordinate Judge of Aligarh, dated the 30th of June 1909.

(1) (1909) 14 C. W. N, 18.

of the 1st June, 1878, namely, Mahal Udyaon. It seems quite certain that the executant intended that the operation of the deed should be the same with regard to all this property (see the very clear language used at the end of clause 8) I think, therefore that it is impossible to accept the contention that the 6th clause of the deed was intended to operate *in præsenti* as a gift of Mahal Udyaon Nor do I find anything in the 7th clause which can be construed as a gift of property *in præsenti*. According to this clause Lachhman Singh is to become the full and permanent *jainashin* of the Raja as his adopted son, that is to say, because he is his adopted son who takes the place of a natural son. The mood of the word 'take' in the passage 'take all my movable and immovable property' indicates something to be done in the future. The Raja lays upon Lachhman Singh the duty of taking his property. No one seems to have supposed that it was the duty of Lachhman Singh to give the Rani the allowance here mentioned from the date of the deed, for it is not suggested that the allowance was ever given by him

"According to the 8th clause the real things to be accomplished were the appointment of a successor and the adoption of a son who would be the Raja's *full successor* and be entitled to all his movable and immovable property then existing or to be acquired thereafter or which might devolve on him by inheritance. The words chiefly relied upon in this clause are 'donee' (*mauhub-lahu*) and 'legatee' (*musi lahu*) It is true that the *former* is the word employed to denote a person who takes under a *hiba* or gift, but the context seems to show that the Raja considered that Lachhman Singh was as much a donee under the deed of 1883 as under the deed of 1887, and the reference to the property to be acquired thereafter negatives the idea of an immediate gift of all the executant's property and points to testamentary intention. The 8th clause appears to me as clearly testamentary as the 5th clause, which is admittedly testamentary"

After referring to the large amount of stamp duty to which under the Stamp Act of 1879 the deed would have been liable as another reason against the probability that the Raja intended it to be a deed of gift the judgment continued :—

"In this connection it must be remembered that it was the duty of the Registering Officer to see that the deed bore a proper stamp, so that the Raja would have run a great risk in presenting for registration what was on the face of it a deed of gift. If the Raja intended by this deed to transfer the title to his property, he must have deliberately avoided using the ordinary language of a gift, and, as far as I can see, his only object can have been to defraud the revenue. It is impossible to assume that he had any such intention and one must look elsewhere for his reason for not employing the ordinary language of a gift. I do not believe that the Raja intended this document to be a deed of gift. There is in it no such description of the property as is required for a deed of gift, but the language is appropriate to a devise and bequest of a man's whole property. For these reasons I hold that the instrument of May 5th, 1887, is not a deed of gift."

MR. EVANS on this point said :—

"Now, what are the circumstances under which this deed was executed? It is recited in the deed that the executant had executed a deed in favour of one

Singh, respondent, who is a half brother of Umrao Probate, however, was granted Besides, in the present case there has been a finding in favour of the will The only question which now arises is whether or not the bequest of the testator of his property to the trustee for the purpose of completing the building of the temple and the subsequent installation and maintenance of the idol is valid The only argument against its validity is based on the ground that at the time of the will and the testator's death the idol was not in existence and that, therefore, the gift to a non-existent person was void under the Hindu Law The doctrine that such a gift was void for some time found favour in the Calcutta High Court, extending as it did the decision of their Lordships of the Privy Council in *Ganendro Mohun Tagore* v. *Juttendro Mohun Tagore* (1) to gifts to unconsecrated idols The question recently came before the Calcutta High Court in the case of *Bhupati Nath Smrititirtha* v *Ram Lal Moitra* (2) In principle the will in that case is identical with the will in the present case The question as to the validity of the gift was referred to a Full Bench consisting of Jenkins, C J, and Stevens, Mookerjee, Coxe and Chatterji, JJ The Court were unanimous in holding that the principle laid down in *Tagore* v *Tagore* did not apply to gifts like the present, and that the bequest was a valid gift We agree with the decision of the Calcutta Full Bench and we think it unnecessary, having regard to the lengthy judgement delivered by the Calcutta Judges, to merely repeat their reasons The result is that we allow the appeal, set aside the decree of the court below, and dismiss the plaintiff's claim We direct each party to abide his own costs in all courts

*Appeal allowed*

(1) (1874) L R 1 I A 387 9 B L R 377 (2) (1909) 14 C W N, 18

*Sir R Finlay, K C* and *Ross* for the appellants contended that the transfer of the property in suit in 1886 by Raja Madho Singh to Lachhman Singh was a valid transfer, and the Court below had wrongly held that under Act I of 1869, in order to effect such a transfer, a registered deed was necessary The provisions of Act I of 1869 relating to the requisites for such a transfer had not been repealed by the Transfer of Property Act (IV of 1882) so that those provisions must be taken as governing the case Under Act I of 1869, it was submitted, an oral transfer (meaning one otherwise than by written instrument) was effectual, and it was contended that the provisions of section 17 as to registration did not apply to Lachhman Singh, because as an adopted son he was one of the class referred to in section 13 in respect of whom a written and registered instrument was not required to validate a gift *inter vivos* by a taluqdar Reference was made to Act IV of 1882, sections 2(a) and 123, Act I of 1869, sections 11, 12, 13, 14, 15, 16 and 17, and *Chhabraj Kunwar* v *Gopal Lal* (1) [SIR A WILSON referred to *Balraj Kunwar* v *Jagatpal Singh* (2)] But even if the gift made in 1886 was invalid as not being in writing or registered, the gift was completed by the deed of 5th May 1887, which, it was contended, was, and was intended to be a deed of gift *in præsenti* and not a testamentary instrument, as had been wrongly decided by the Court below As to its proper construction reference was made to *Surajmani* v *Rabi Nath Ojha* (3), *Lalit Mohun Singh Roy* v *Chukkun Lal Roy* (4); *Marcar* v *Sigg* (5), Sykes compendium of Taluqdari Law, pages 263, 264, 265, and *Shere Bahadur Singh* v *Dariao Kuar* (6)

*DeGruyther, K C*, *Moti Lal Nehru* and *B Dube* for the first respondent contended that, assuming an oral gift of the property in suit to have been made by Raja Madho Singh, it was ineffectual in law to pass title to Lachhman Singh because the provisions of sections 16 and 17 of Act I of 1869, and of section 123 of Act IV of 1882 had not been complied with

(1) (1906) 9 Oudh Cases 113
(2) (1904) I L R, 26 All 393; L R 31 I A 132
(3) (1907) I L R, 30 All 84; L R 35 I A 17
(4) (1897) I L R, 24 Calc 834; L R 24 I A 76
(5) (1859) I L R, 4 Mad 239; L R 7 I A 83
(6) (1877) I L R, 3 Cal 645 (651)

the District Judge, who allowed their appeals, relying on *Abdur Razzaq* v. *Mumtaz Husain* (1), and dismissed plaintiff's suit with costs.

Raj Narain Rai appealed to the High Court.

Munshi *Govind Prasad*, for the appellant, contended that his client not being a party to the former suits was not bound by their decision, and relied on *Kamta Prasad* v. *Mohan Bhagat* (2) and on the judgment of MAHMOOD, J., in *Gobind Dayal* v. *Inayatullah* (3).

Mr. *M. L. Agarwala*, Babu *Sital Prasad Ghosh* and Babu *Balram Chandra Mukerji* for the respondents, relied on *Abdur Razzaq* v. *Mumtaz Husain* (1), *Lalat Husain* v. *Rashid-ud-din* (4) and *Intizar Husain* v. *Jumna Prasad* (5).

KNOX and PIGGOTT, JJ.—These are two connected appeals arising out of a suit for pre-emption. There are four distinct parties concerned. The first two defendants are the vendors, and they have sold a certain share in a mahal to defendants Nos. 3, 4 and 5, who are strangers. The defendant No. 6 (Dina or Dunia Pande) and defendants Nos. 7 to 19 (Mahadeo Rai and others) are rival pre-emptors. The sale by the vendors to the vendees took place on December 20th, 1906, the consideration stated in the deed of sale being Rs. 1,500. On October 21st, 1907, Dina (or Dunia) filed a suit for pre-emption in the court of the Subordinate Judge of Ghazipur, and on November 29th, 1907, that court gave him a decree for pre-emption in respect of 1/14th of the property concerned. The second set of pre-emptors Mahadeo Rai and others, filed their suit in the court of the Munsif of Muhammadabad on October 29th, 1907. Their plaint was returned to them on December 14th, 1907, for presentation in the court of the Subordinate Judge. It was presented accordingly on December 16th, 1907, and the claim of Mahadeo Rai and others decreed in respect of the remaining 13/14ths of the property sold on December 23rd, 1907. The plaintiffs in both these suits accepted the sale consideration as being Rs. 1,500 according to the specification in the sale deed. The present suit was brought on December 17th, 1907, in the court of the Munsif of

(1) (1903) I. L. R., 25 All., 331.
(2) (1909) 6 A. L. J., 966.
(3) (1885) I. L. R., 7 All., 775, 800.
(4) (1906) 3 A. L. J., 791.
(5) (1904) 1 A. L. J., 247.

*Sir R. Finlay, K. C.* and *Ross* for the appellants contended that the transfer of the property in suit in 1886 by Raja Madho Singh to Lachhman Singh was a valid transfer, and the Court below had wrongly held that under Act I of 1869, in order to effect such a transfer, a registered deed was necessary. The provisions of Act I of 1869 relating to the requisites for such a transfer had not been repealed by the Transfer of Property Act (IV of 1882), so that those provisions must be taken as governing the case Under Act I of 1869, it was submitted, an oral transfer (meaning one otherwise than by written instrument) was effectual, and it was contended that the provisions of section 17 as to registration did not apply to Lachhman Singh, because as an adopted son he was one of the class referred to in section 13 in respect of whom a written and registered instrument was not required to validate a gift *inter vivos* by a taluqdar. Reference was made to Act IV of 1882, sections 2(*a*) and 123; Act I of 1869, sections 11, 12, 13, 14, 15, 16 and 17; and *Chhabraj Kunwar* v. *Gopal Lal* (1) [SIR A. WILSON referred to *Balraj Kunwar* v *Jagatpal Singh* (2)]. But even if the gift made in 1886 was invalid as not being in writing or registered, the gift was completed by the deed of 5th May 1887, which, it was contended, was, and was intended to be, a deed of gift *in præsenti* and not a testamentary instrument, as had been wrongly decided by the Court below. As to its proper construction reference was made to *Surajmani* v *Rabi Nath Ojha* (3); *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (4); *Marcar* v. *Sigg* (5); Sykes compendium of Taluqdari Law, pages 263, 264, 265; and *Shere Bahadur Singh* v. *Dariao Kuar* (6).

*DeGruyther, K.C*, *Moti Lal Nehru* and *B. Dube* for the first respondent contended that, assuming an oral gift of the property in suit to have been made by Raja Madho Singh, it was ineffectual in law to pass title to Lachhman Singh because the provisions of sections 16 and 17 of Act I of 1869, and of section 123 of Act IV of 1882 had not been complied with

(1) (1906) 9 Oudh Cases 113
(2) (1904) I L R, 26 All, 393
L R 31 I A 132
(3) (1907) I L R, 30 All, 84
L R, 35 I A, 17
(4) (1897) I L R 24 Calc, 834:
L R, 24 I A, 176
(5) (1880) I L R, 2 Mad 239:
L R, 7 I A, 83
(6) (1877) I L R 3 Calc, 645 (651).

of pre emption arises upon the transfer of [illegible] decree in a suit for pre-emption, but we are [illegible] in the present case with the truth or otherwise of [illegible] The suit is really based on the original transfer by and is brought within the prescribed period of limitation from the date of the same We were referred in the course [illegible] sundry other rulings, none of which appears [illegible] point now in issue For instance, in S *[illegible]h Mal* v [illegible] (1) it was held that a re sale by a stranger to a [illegible] equal rights with the party seeking pre emption [illegible] the said party's right, but in the present case [illegible] broad distinction between a re sale and the sub[illegible] purchaser for the original vendee under a decree [illegible] the whole point of the plaintiff appellant's claim [illegible] right of pre emption superior to that of any of [illegible] ors We were referred also to an unpubl[illegible] Court in *Allahdad Khan* v *Munshi Abdul L[illegible]* [illegible] it was held in effect that, when there has been a re sale by the original vendee before any suit for pre emption had been instituted, a person seeking to enforce a right of pre emption must claim to pre empt both sales It is clear, however, that a right of pre emption is not a right of re purchase but a right of substitution for the original vendee—*vide* I L R 7 All, 775 There has not been under the decrees in favour of the rival pre emptors any fresh transfer in their favour They have been put in the place of the original vendees Those vendees acquired by their purchase a valid title, but one subject to the exercise of the right of pre emption by any person possessed of such right The defendants Nos 6 to 19 have stepped into the shoes of these vendees, and if the plaintiff in fact has a right of pre emption superior to theirs, and claims to exercise it within the period of limitation allowed by the law from the date of the original sale, there seems no reason for holding that his right has been extinguished by the fact that decrees have been passed in favour of those defendants in two suits to which the plaintiff was not a party In an older case in this Court, *Muhammad Latif* v *Gobind Singh* (3), a suit very

(1) (1897) I L R 20 All 100 (2) (1883) I L R 5 All 383
(3) S A No 721 of 1906 decided on April 15th 1907

Oudh, formerly the property of Raja Madho Singh, deceased, whose name appears in Lists I and II mentioned in section 8 of the Oudh Estates Act (Act I of 1869)

Madho Singh died on the 24th of August 1891 Under his will, dated the 1st of May 1891, the respondent Bhagwan Bakhsh Singh has been in possession ever since Madho Singh's death

The respondent's title is challenged by the first appellant Babu Udai Raj Singh, representing the late plaintiff Gur Bakhsh Singh

The claimant Gur Bakhsh Singh deduced his title from one Lal Lachhman Singh who was adopted by Madho Singh, but died on the 12th of April 1891, in the lifetime of his adoptive father His case was that Madho Singh in his lifetime made over the estate to Lachhman Singh in one or other of two ways, either by a verbal gift to be inferred from Madho Singh's conduct and the circumstances of the case, or by a registered instrument which is dated the 5th of May 1887, and was intended, it is said, to take effect as an immediate transfer

The cause of action as alleged by the claimant accrued on the death of Madho Singh's widow, Lachhman Singh's adoptive mother, on the 17th of December 1893 But the suit was not instituted until the 22nd of August 1903

At the trial there was a great mass of evidence on issues not material on this appeal

The appeal, which was allowed by special leave, is confined to two questions —

1 Is immovable property in Oudh transferable by gift *inter vivos* otherwise than by registered deed?

2 What is the meaning and effect of the instrument dated the 5th of May 1887?

The Subordinate Judge, though he rejected as untrustworthy the testimony of a large body of witnesses who deposed to the fact of a verbal gift, thought that there must have been a gift of that sort, but he held the gift invalid having regard to the provisions of the Act of 1869 The Court of the Judicial Commissioner declined to go into the question of a verbal gift, holding that no transfer by way of gift could be effected otherwise than by a registered deed

that the adoption of Lachhman Singh had been made at his instance

On the 28th of April, 1886, Madho Singh effected mutation of names in respect of the Amethi taluqa (except the muafi villages and the villages dedicated to the endowment of the temple at Benares) in favour of Lachhman Singh on an application which stated that if Lachhman Singh's connection with the estate should be severed during Madho Singh's lifetime then the whole estate would revert to him Mutation of names in the case of the muafi villages followed on a supplementary application by Madho Singh

On the 5th of May, 1887, Madho Singh executed the instrument which has given rise to the present question The document is not very clear, nor is it altogether intelligible In the last paragraph Madho Singh declares that he had written the deed "by way of a deed of adoption and codicil to a will in order to amend and rectify the deed of 26th of May, 1883, by adding some necessary provisions to it" The deed in the main is clearly testamentary in its character, but there are two paragraphs which gave some colour to the plaintiffs' claim The first five paragraphs have no material bearing on the present question Paragraph 6 begins by stating that he (Madho Singh) had had the instrument of the 1st of June, 1878 which he had executed in favour of Sarabjit Singh, cancelled and destroyed with the consent of Sarabjit Singh and Sarabjit Singh had again put him in possession of the estate Madho Singh then declares that, after getting possession, he had made over the whole of the said property to his adopted son, and had absolutely and unconditionally relinquished all rights and proprietorship, as well as ceased interference with the property, and he concludes the paragraph by saying, 'therefore neither Sarabjit Singh himself nor his representatives have any right left to make a claim under the deed of 1st of June 1878" In clause 8 Madho Singh describes Lachhman Singh as "my adopted son and donee and legatee under the deed dated 26th of May, 1883, as well as under this deed . . in respect of all my movable and immovable property which has already been acquired, or which may be acquired hereafter during my

Registered No 422.

[V]OL. XXXII.] [PART VIII



# [T]HE INDIAN LAW REPORTS.

## AUGUST 1910.

(Pages 345—410.)

## ALLAHABAD SERIES,

CONTAINING

[C]ASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council ... J. V. WOODMAN, *Middle Temple.*

High Court, Allahabad ... W. K. PORTER, *Gray's Inn*



ALLAHABAD:

PRINTED BY F. LUKER, SUPERINTENDENT, GOVERNMENT PRESS,
AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT,
UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

Price, Re. 1.

for the suit had expired affirmed the finding as to the genuineness of the *sipurdnama* and *warasatnama* and dismissed the appeal.

SIX consolidated appeals from six decrees (21st March 1904) of the High Court at Allahabad, which reversed six decrees (14th May 1900) of the District Judge of Gorakhpur

The suits out of which these appeals arose were brought on 14th January 1899 by the Raja of Basti, the first respondent, to recover possession of a number of villages or shares in villages situate in the district of Basti, on the allegations that the property in dispute belonged to the Basti raj, an impartible raj of which the plaintiff was the owner, that a custom prevailed in the raj whereby the property belonging to it descended to the eldest son according to the rules of primogeniture, that on the death of a Raja and the succession of his son to the raj, a portion of the property is given to the brothers of the ruling Raja, who were called Babus, as *haq babuai* or maintenance, and on failure of male issue of such brothers the property so given reverted to the raj after the death of the Babus and their widows The plaintiff alleged that under this custom the property in suit reverted to the raj on the death in 1887, of the surviving widow of Babu Chet Singh, who was nephew of Raja Pirthipal Singh a former Raja of Basti The plaintiff also claimed to be entitled to the property by virtue of a deed of assignment *(sipurdnama)* executed on 21st March 1848, by Babu Chet Singh in favour of Raja Indar Dawan Singh, the then ruling Raja, and he also relied upon a *warasatnama*, or will, executed by Dulahin Rup Kunwari, the surviving widow of Chet Singh, on 6th January, 1858, in favour of his father the late Raja Mahesh Sitla Bakhsh Singh.

The facts are sufficiently stated in the judgment of their Lordships of the judicial committee, and also in the report of the appeals before the High Court, which will be found in I L R, 26 All, 528 All the suits were tried together, the evidence produced in one of them being, by consent of parties, admitted as evidence in the others

The District Judge, so far as the issues now material are concerned, held that the plaintiff had "failed to prove that the Raj is an impartible raj or that limited estates are granted for maintenance to the younger members of the family

Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1909 ... Rs. 1-2-0. (8 a.)

Act V of 1870 (Unclaimed Deposits), as modified up to 1st October, 1908 ... 1 a. (1 a.)

Act VII of 1870 (Court Fees), as modified up to 1st February, 1909 ... Rs. 1-2-0. (2 a.)

Act XXIII of 1871 (Pensions), as modified up to 1st September, 1909 ... 2 a. 3 p. (1 a.)

Act XXVII of 1871 (Criminal Tribes), as modified up to 1st October, 1908 ... 5 a. 6 p. (1 a. 6 p.)

Act I of 1872 (Evidence), as modified up to 1st May, 1908 ... Re. 1. (2 a.)

Act IX of 1872 (Contract), as modified up to 1st February, 1908 ... Re. 1. 4 a. (2 a.)

Act IX of 1874 (European Vagrancy), as modified up to 1st September, 1909 ... 6 a. 6 p. (1 a.)

Act I of 1878 (Opium), as modified up to 1st October, 1907 ... 5 a. 6 p. (1 a.)

Act VI of 1878 (Treasure Trove), as modified by Act XII of 1891, as reprinted on the 14th February, 1908 ... 2 a. 9 p. (1 a.)

Act VIII of 1878 (Sea Customs), as modified up to 1st June, 1908 ... Rs. 1-5-3. (4 a.)

Act XI of 1878 (Arms), as modified up to 1st March, 1910 ... 6 a. (1 a.)

Act XVI of 1879 (Transport of Salt), as modified up to 1st October, 1907 ... 1 a. 6 p. (1 a.)

Act XIII of 1880 (Vaccination), as modified up to 1st September, 1909 ... 4 a. 9 p. (1 a.)

Act XV of 1881 (Factories) as modified up to 1st April, 1910 ... 5 a. 6 p. (1 a. 6 p.)

Act XVIII of 1881 (Central Provinces Land-revenue), as modified up to 1st March, 1909 ... Rs. 1-2-0. (3 a.)

Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September, 1909 ... 10 a. (1 a.)

Act II of 1882 (Indian Trusts), as modified up to 1st June, 1909 ... 10 a. (1 a.)

Act XII of 1882 (Salt), as modified up to 1st August, 1909 ... 7 a. (2 a.)

Act V of 1883 (Indian Merchant Shipping), as modified up to 1st September, 1909 ... 6 a. (1 a.)

Act IV of 1884 (Explosives), as modified up to 1st September, 1908 ... 4 a. (9 p.) (1 a.)

Act IX of 1884 (Legal Practitioners), as modified up to 30th June, 1909 1 a. 6 p. (1 a.)

Act III of 1888 (Police), as modified up to 1st January, 1909 ... 1 a. 9 p. (1 a.)

Act II of 1889 (Measures of Length), with footnotes ... 1 a. 3 p. (1 a.)

Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st August, 1908 ... 6 a. (1 a.)

Act VI of 1889 (Probate and Administration), as modified up to 1st January, 1909 ... 2 a. 9 p. (1 a.)

Act VI of 1890 (Charitable Endowments), as modified up to 1st August, 1908 ... 2 a. 6 p. (1 a.)

Act IX of 1890 (Indian Railways) as modified up to 1st June, 1909 ... Re 1-2-0 (2 a.)

Act XI of 1890 (Prevention of Cruelty to Animals), with foot-notes ... 2 a. (1 a.)

Act XIII of 1890 (Excise Malt Liquors), as modified up to 1st October, 1908 ... 1 a. 6 p. (1 a.)

Act X of 1891 (Indian Penal Code Amendment), as modified up to 1st August, 1909 ... 1 a. (1 a.)

Act XII of 1895 (Indian Companies Memorandum of Association) as modified up to 1st August, 1909 ... 2 a. (1 a.)

Act III of 1898 (Lepers), as modified up to 1st September, 1909 ... 4 a. (1 a.)

Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August, 1909 ... Rs. 3 10 a. (8 a.)

Act VIII of 1899 (Petroleum), as modified up to 1st January, 1909 ... 7 a. (1 a.)

Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February, 1908 ... 2 a. 6 p. (1 a.)

Rup Kunwari in 1887, both these documents were set up by Raja Mahesh Sitla Bakhsh Singh in support of his claim to the property. Rudra Narain Singh admits that on the day after the death of Rup Kunwari notice of the *sipurdnama* was given to him. Every circumstance in fact points to the genuineness of these documents. No suit, it is true, was brought by Raja Mahesh Sitla Bakhsh Singh in his life-time for recovery of the property. It appears that he was heavily involved in debt, and possibly as is suggested he had not the means of providing for the expenses of litigation. He died on the 4th of May 1890, and was succeeded in the raj by the plaintiff. He also was involved in litigation at the suit of the creditors of his father. 'Hundreds of civil suits were instituted against him,' he says in the plaint, and he was thus involved in difficulties and being a minor was not even fully acquainted with the state of things. It was not until the period of limitation was about to expire that the present suit was instituted.

The High Court therefore reversed the decision of the District Judge and decreed the suit. On this appeal

*Cohen, K. C., G. E. A. Ross*, and *B. Dube*, for the appellants contended that the High Court was in error in holding that the *sipurdnama* and the *warasatnama* were genuine documents, and that, with reference to the terms of the former document, the plaintiff was entitled to the relief claimed in his plaints. The suits were barred by the law of limitation, as the brother of the plaintiff whom the Court considered a necessary party, could not be added, as he was, after the period of limitation for the suits had expired. Reference was made to the Limitation Act (XV of 1877), section 22, and *Gururaya Gouda v. Dattatraya Anant* (1). The District Judge had rightly held that the plaintiff had failed to prove the material allegations in his plaints and that decision had been wrongly reversed by the High Court.

*DeGruyther, K. C.*, and *H. Cowell*, for the first respondent contended that on the evidence as to their execution, and on a consideration of the circumstances and probabilities of the cases, the High Court was right in holding that the *sipurdnama* and *warasatnama* were genuine documents; moreover being more than 30 years old, and coming from the proper custody they ought to be presumed to be genuine under section 90 of the Evidence Act (I of 1872). As to the custom, where property is transferred for maintenance for the junior members of the family, it reverted to the raj on failure of the objects of its

(1) (1903) I. L. R. 28 Bom. 11.

| | | |
|---|---|---|
| Act VI of 1890 (Charitable Endowments) as modified up to 1st August 1908 | In Urdu | 6 p (1 a) |
| Ditto ditto | In Nagri | 9 p (1 a) |
| Act XII of 1896 (Excise) as modified up to 1st March 1907 | In Urdu | 2 a 9 p (2 a) |
| Ditto ditto | In Nagri | 3 a 3 p (2 a) |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 | In Urdu | 9 p (1 a) |
| Ditto ditto | In Nagri | 9 p (1 a) |
| Act I of 1906 [Indian Tariff (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act III of 1906 (Coinage) | In Urdu | 9 p (1 a) |
| Ditto ditto | In Nagri | 9 p (1 a) |
| Act V of 1906 (Stamp Amendment) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act III of 1907 (Provincial Insolvency) | In Urdu | 1 a 6 p (1 a) |
| Ditto | In Nagri | 1 a 6 p (1 a) |
| Act IV of 1907 [Repealing and Amending (Rates and Cesses) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act V of 1907 (Local Authorities Loan) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VI of 1907 (Prevention of Seditious Meetings) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act I of 1908 (Legal Practitioners) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act II of 1908 (Tariff) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act III of 1908 [Indian Trusts Amendment] | In Urdu | 3 p (1 a) |
| Act V of 1908 (Code of Civil Procedure) | In Urdu | Rs 1 2 (6 a) |
| Ditto ditto | In Nagri | Rs 1 2 (6 a) |
| Act VI of 1908 (Explosives Substances) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VII of 1908 (Incitements to Offences) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act IX of 1908 (Limitation) | In Urdu | 2 a (1 a) |
| Ditto ditto | In Nagri | 2 a (1 a) |
| Act X of 1908 (Salt Duties) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act XI of 1908 (Assam Labour and Emigration) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (2 a) |
| Act XIV of 1908 [Indian Criminal Law (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act XVI of 1908 (Indian Registration) | In Urdu | 2 a (2 a) |
| Ditto ditto | In Nagri | 2 a (2 a) |
| Act XVII of 1908 (Indian Emigration) | In Urdu | 2 a 3 p (2 a) |
| Ditto ditto | In Nagri | 2 a 3 p (2 a) |
| [Act I of 1909 (Indian Steamship Law Amendment)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act IV of 1909 (Whipping) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act V of 1909 [Amending (Army Act)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VII of 1909 (Anand Marriage) | In Urdu | 3 p (1 a |
| Ditto ditto | In Nagri | 3 p (1 |

Chet Singh, who was nephew of a former Raja—Raja Pirthipal Singh The plaintiff also claimed to be entitled to the properties by virtue of a deed of assignment (*sipurdnama*) executed 21st March 1848, by Babu Chet Singh, in favour of the then ruling Raja Indar Dawan Singh, and he relied also upon a "warasat nama" or will executed by Dulahin Rup Kunwari, the surviving widow of Chet Singh, on the 6th January 1858, in favour of his father, the late Raja Mahesh Sitla Bakhsh Singh

The trial Judge held that the custom of the raj set up by the plaintiff was not proved. He also held that it was not proved that either the *sipurdnama* or the *warasatnama* was duly executed. The High Court, without formally differing from his finding as to the custom, considered it unnecessary to decide the point, since it was common ground that the *sipurdnama*, if a genuine document, was decisive of the case The property in dispute had undoubtedly been acquired by Chet Singh in his lifetime He was said, and, as the High Court held, proved to have sold some of it to his wife, Rup Kunwari.

The *warasatnama* was therefore important, not only as throwing confirmatory light on the *sipurdnama*, but as embracing the property said to have been thus disposed of by Chet Singh, so that the whole of the property in question, if both documents were genuine, passed *quâcunque viâ* to the plaintiff The High Court, after a very minute and elaborate examination of both the documents themselves, which they seem to have scrutinised much more closely than did the Court below, as well as the evidence in support of them, arrived at a clear conclusion that they were genuine documents and decisive of the case They therefore reversed the decision of the Court below in six cases.

Their Lordships agree with the conclusions and reasoning of the High Court, and will humbly advise His Majesty that these appeals be dismissed with costs

*Appeals dismissed*

Solicitors for the appellants.—*Barrow, Rogers and Nevill*

Solicitors for the respondents.—*Ranken Ford, Ford and Chester*

[J. V. W.

# List of Books and Publications for sale which are more than two years old.

## LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No 8, Hastings Street, Calcutta

THE PRICES OF THE GENERAL ACTS LOCAL CODES, MERCHANT SHIPPING DIGEST AND INDEX TO ENACTMENTS HAVE BEEN CONSIDERABLY REDUCED

### I —THE INDIAN STATUTE-BOOK.

REVISED EDITION

*Super-royal 8vo cloth lettered*

#### A —STATUTES

| | | |
|---|---|---|
| A Collection of Statutes relating to India, Volume I containing the Statutes up to the end of 1890 Edition 1899 | Rs 6 | (10 a) |
| A Collection of Statutes relating to India, Volume II containing the Statutes from 1891 to 1898 Edition 1900 | Rs 9 | (10 a) |

#### C -LOCAL CODES

| | | |
|---|---|---|
| The Ajmer Code, Third Edition, 1905 containing the enactments in force in Ajmer Merwara, with an Appendix consisting of a list of the enactments which have been declared in force in or extended to, Ajmer Merwara by notification under the Scheduled Districts Act, 1874, with a Chronological Table and an Index | Rs 2 8 | (7 a) |
| The Baluchistan Code, Edition 1900, containing the local enactments in force in British Baluchistan and the Agency territories with Chronological Tables and an Index | Rs 5 | (10 a) |
| The Burma Code Edition 1899 .. | Rs 5 | (9 a) |
| The Central Provinces Code, Third Edition, 1904, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the Central Provinces, with an Appendix containing a list of the Acts which have been applied to the Scheduled Districts of the Central Provinces by notification under the Scheduled Districts Act 1874 and an Index | Rs 4 | (6 a) |
| The Madras Code, Vols I and II Edition 1902 Rs 12 Reduced to Rs 8 . . | | (Re 1) |
| The Punjab and North West Code, Edition 1903, consisting of the unrepealed enactments locally in force in the Punjab and the North West Frontier Province with Appendix and an Index | Rs 6 | (10 a) |

### II —REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION

| | | |
|---|---|---|
| Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893 (with foot notes brought down to 1st December, 1901) .. . .. . | 7 a | (1 a) |
| Act XX of 1847 (Copyright), as modified up to 1st December, 1903 | 5 a | (1 a) |
| Act XVIII of 1850 (Judicial Officers' Protection) with footnotes | 1 a 9 p | (1 a) |
| Act XIX of 1850 (Apprentices), as modified up to 1st May, 1905 | 3 a 6 p | (1 a) |
| Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903 .. | 2 a 6 p | (1 a) |
| Act VIII of 1851 (Tolls on Roads and Bridges), as modified up to 1st June, 1897 .. ... .. . . | 2 a 6 p | (1 a) |

their judgement in the present case A great deal of the evidence produced to show that married men and boys had been adopted was the same in both cases, and the instances in which such an adoption had occurred will be found commented on in the judgement in the earlier case as well as in the judgement now appealed from

On this appeal

*DeGruyther, K C.* and *H Cowell* for the appellant contended that the High Court had wrongly held that amongst Jains the adoption of a married man was a valid adoption Jains belonged to the twice-born classes, and were governed by the ordinary Hindu law (in this case, the Mitakshara) in the absence of any special custom proved to the contrary Reference was made to *Bhagvandas Tejmal* v *Rajmal* (1), *Chotay Lal* v *Chunnoo Lal* (2), *Bachebi* v *Makhan Lal* (3), *Shimbhu Nath* v *Gayan Chand* (4), *Ambabai* v *Govind* (5), *Mandit Koer* v *Phool Chand Lal* (6) and *Peria Ammani* v *Krishnasami* (7) By the ordinary Hindu law a married man cannot be adopted, even if he were of the same gotra as his adoptive father "Marriage is the rite by which the filial relation can be completed in the case of Sudras," so that an adoption to be valid must take place before marriage and the ceremony of "upanayanam is the rite which completed the filial relationship in the case of Brahmans, and though this latter rule has been relaxed in the case of sagotras, there is no warrant for the contention that the relaxation can be extended to marriage" see (*Pichuvayyan* v *Subbayyan* (8) Cases in the Bombay Presidency where the law of the Mayukha prevails allow the adoption of a married man; *Stokes, Hindu Law Books, Mayukha, page 64, Chapter IV, section 5, paragraphs 19, 20*; but that law does not apply in the United Provinces And in the case of *Manohar Lal* v. *Banarsi Das* (9) it was held that the instances produced in evidence were sufficient to prove a custom among the Jain community in the United Provinces whereby the adoption of a married man

(5) (1898) I. L. R, 23 Bom., 257 (262)

(6) (1897) 2 C W N, 154 (158).

(7) (1893) I L R 16 Mad, 162 (164)

(8) (1889) I. L. R, 13 Mad 128 (132)

(9) ([illegible]) I. L. R., 20 All., 495

# List of Books and Publications for sale which are more than two years old

## LEGISLATIVE DEPARTMENT.

ese publications may be obtained from the Offic of the Superintendent of Government Printing India, No 8 Hastings Street, Calcutta

THE PRICES OF THE GENERAL ACTS LOCAL CODES MERCHANT SHIPPING DIGEST AND INDEX ENACTMENTS HAVE BEEN CONSIDERABLY REDUCED

### I.—THE INDIAN STATUTE BOOK

REVISED EDITION

*Super royal 8vo cloth lettered*

#### A —STATUTES

| | | |
|---|---|---|
| Collection of Statutes relat ng to Ind a Volume I containing the Statutes up to the end of 1890 Edition 1899 | Rs 6 | (10 a) |
| Collection of Statutes relat ng to India Volume II conta ning the Statutes from 1891 to 1898 Ed t on 1900 | Rs 9 | (10 a) |

#### C LOCAL CODES

| | | |
|---|---|---|
| The Ajmer Code Third Edition 1905 containing the enactments in force in Ajmer Merwara with an Appendix consisting of a list of the enactments which have been declared in force in or extended to Ajmer Merwara by notification under the Scheduled Distr cts Act 1874 with a Chronological Table and an Index | Rs 2 8 | (7 a) |
| The Baluchistan Code Ed tion 1900 containing the local enactments in force in British Baluchistan and the Agency territor s with Chronolog cal Tables and an Index | Rs 5 | (10 a) |
| The Burma Code Edition 1899 | Rs 5 | (9 a) |
| The Central Prov nces Code, Third Edition 1904 consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the Central Provinces with an Append x containing a l st of the Acts which have been appl ed to the Scheduled Districts of the Central Provinces by notification under the Scheduled D stricts Act 1874 and an Index | Rs 4 | (6 a) |
| The Madras Code Vols I and II Ed t on 1902 Rs 12 Reduced to Rs 8 | | (Re 1) |
| The Punjab and North West Code Ed t on 1903 consisting of the unrepealed enactments locally in force in the Punjab and the North West Frontier Prov nce with append x and an Index | Rs 6 | (10 a) |

### II —REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION

| | | |
|---|---|---|
| Acts X of 1841 and XI of 1850 (Reg strat on of Sh ps) as mod fied up to 1st D cemb r 1893 (with foot notes brought down to 1st December 1901) | 7 a | (1 a) |
| Act XX of 1847 (Copyright) as mod fied up to 1st Decemb r 1903 | 5 a | (1 a) |
| Act XVIII of 1850 (Judicial Officers Protection) with footnotes | 1 a 9 p | (1 a) |
| Act XIX of 1850 (Apprentices) as modified up to 1st May 1905 | 3 a 6 p | (1 a) |
| Act XXXIV of 1850 (State Prisoners) as modified up to 30th April 1903 | 2 a 6 p | (1 a) |
| Act VIII of 1851 (Tolls on Roads and Br dges) as mod fied up to 1st June 1907 | 2 a 6 | (1 a) |

between the Jains and the Hindus, Dr. Hœrnle's Presidential Address to the Asiatic Society of Bengal in 1898, pages 39, 40 and 42, and *Bhagvandas Tejmal* v. *Rajmal* (1) were referred to. Adoption amongst Jains was a purely secular matter, and the rules of the Hindu Law of adoption which were based on religious principles were not applicable to them. [*Sir A. Wilson*—Has it ever been decided in the case of the adoption of a married man whether children born to him before his adoption, come into the inheritance or not?] That question has, to my knowledge, not been decided. The restriction of age for marriage, and for the investiture with the sacred thread (upanayanam) took place long after the separation between the Jains and Hindus. Mayne's Hindu Law, 7th Ed., pages 131, 132, 135 *et seqq.* 172, 179, 192, 193; G. C. Sarkar on Adoption (Tagore Law Lectures, 1888), pages 359, 361—364, 367, 452—454, and Dr. Jolly's Hindu Law of Adoption (Tagore Law Lectures, 1885), page 161, were referred to. The evidence was commented on as to the instances of adoption of a married man, and it was contended that they were sufficient to prove the custom alleged. There was no law prohibiting the adoption of a married man in a case where, as here, the adopted son and the adoptive father were of the same gotra: *Govindnath Roy* v. *Gulabchand* (2); *Nilradayee* v *Bholanath Doss* (3); *Viraraghava* v. *Ramalinga* (4) where the adoption of a boy after the performance of the upanayanam ceremony was held to be valid; Stokes' Hindu Law Books, pages 575, 580; and *Ganga Sahai* v *Lekraj* (5), were referred to. The High Court were right in their conclusions as to the law and facts of the case, and their decision should be upheld.

*DeGruyther, K. C*, in reply, to show that the adoption of a married man was not allowed, cited Strange's Hindu Law (Madras Ed. of 1875), chapter IV, ' On adoption," pages 80 and 353; West and Bühler's Digest, page 765; Dr. Jolly's Hindu Law, page 161 (at bottom of page), and pages 309, 310, and Stokes' Hindu Law Books, page 575, section 22. No one could adopt

(1) (1873) 10 Bom., H. C., 241 (247—249, 252)
(2) (1835) 5 Sel. Rep. S. D. A., Beng. 276
(3) (1853) 9 S. D. A., Beng., 553.
(4) (1883) I. L. R., 9 Mad., 148.
(5) (1886) I. L. R., 9 All., 253.

| | |
|---|---|
| Act XV of 1874 (Laws Local Extent) as modified up to 1st October 1895 | 7 a (1 a) |
| Act IX of 1875 (Indian Majority) as modified up to 1st May 1906 | 2 a (1 a) |
| Act XI of 1876 (Presidency Banks) as modified up to 1st March, 1907 | 11 a (2 a) |
| Act I of 1877 (Specific Relief) as modified up to 1st February 1904 | 11 a (1 a 6 p) |
| Act VII of 1878 (Forests) as modified up to 1st December 1903 | 10 a (2 a) |
| Act XVII of 1878 (Ferries) as modified up to 1st June, 190? | 6 a (1 a 6 p) |
| Act XVII of 1879 (Dekkhan Agriculturists' Relief) as modified up to 1st June 1905 | 10 a (2 a) |
| Act XVIII of 1879 (Legal Practitioners) as modified up to 1st May 1896 | 7 a 6 p (1 a) |
| Act VII of 1880 (Merchant Shipping) as modified up to 15th October 1891 | 10 a (2 a) |
| Act V of 1881 (Probate and Administration) as modified up to 1st July 1890 | 12 a (2 a) |
| Act IV of 1882 (Transfer of Property) as modified up to 1st December 1905 | 15 a (2 a) |
| Act V of 1882 (Indian Easements) as amended by the Repealing and Amending Act 1891 (XII of 1891) | 8 a (1 a) |
| Act VI of 1882 (Companies) as modified up to 1st August 1906 | Re 1 10 (3 a) |
| Act XV of 1882 (Presidency Small Cause Court) as modified up to 1st June 1906 | 10 a (2 a) |
| Act VIII of 1883 (Little Cocos and Preparis Islands Laws) as modified up to 1st October 1902 | 1 a 3 p (1 a) |
| Act XIX of 1883 (Land Improvement Loans) as modified up to 1st September 1906 | ? a 6 p (1 a) |
| Act VI of 1884 (Inland Steam vessels) as modified up to 1st July 1891 | 9 a (2 a) |
| Act VII of 1884 (Steam ships) as modified up to 1st July 1890 | 6 a (1 a) |
| Act XII of 1884 (Agriculturists Loans) as modified up to 1st February 1903 | 2 a (1 a) |
| Act XVIII of 1884 (Punjab Courts) as modified up to 1st December 1899 | 7 a (1 a) |
| Act XIII of 1885 (Indian Telegraph) as modified up to 1st March 1906 | 5 a (1 a) |
| Act II of 1886 (Income tax) as modified up to 1st April 1903 | 8 a (1 a 6 p) |
| Act VI of 1886 (Births Deaths and Marriages Registration) as modified up to 1st June 1891 | 6 a (1 a) |
| Act XI of 1886 (Tramways) as modified up to 1st December 1903 | 9 a (2 a) |
| Act XIII of 1886 (Securities) as amended by Act XII of 1891 | ? a 9 p (1 a) |
| Act VII of 1887 (Suits Valuation) as modified up to 1st October 1904 | 1 a 9 p (1 a) |
| Act IX of 1887 (Provincial Small Cause Courts) as modified up to 1st December 1900 | 6 a (1 a) |
| Act XIV of 1887 (Indian Marine) as modified up to 15th February 1899 | 8 a (1 a) |
| Act V of 1888 (Inventions and Designs) as modified up to 1st July 1903 | 9 a (? a) |
| Act I of 1889 (Metal Tokens) as modified up to 1st April 1903 | 1 a 9 p (1 a) |
| Act VII of 1889 (Succession Certificates) as modified up to 1st December 1903 .. | 5 a 6 p (1 a) |
| Act XIII of 1889 (Cantonments) as modified up to 1st March 1905 | ? a (1 a) |
| Act XV of 1889 (Official Secrets), as modified up to 1st April 1904 | 3 a (1 a) |
| Act X of 1890 (Press and Registration of Books) modified up to 1st December 1903 | .. 2 a 3 p (1 a) |

adoption and made a decree in the plaintiff's favour The High Court held that the adoption had taken place in fact and was valid in law, and therefore reversed the decision of the first Court Hence the present appeal

That the adoption took place in fact is no longer in dispute The sole question which has been seriously argued is whether the adoption was valid in law, the objection to the adoption being based upon the fact that the adopted son was already married at the time of his adoption

So far as the pure law applicable to the case is concerned there is nothing in doubt There is no longer any question that by the general Hindu law applicable to the twice born classes, a boy cannot be adopted after his marriage, and there is no doubt that the Agarwala Jains belong to one of the twice born classes

To this rule there is an exception in the case of persons governed by the Mayukha, but that exception has no application to the present case Other exceptions have been held to exist by custom Again there is no doubt that the Agarwala Jains are governed by the ordinary Hindu law (which for the present purpose means the Mitakshara law) unless and until a custom to the contrary is established

The question in the present case was and is, whether a custom, applicable to the parties concerned and authorizing the adoption of a married boy, has been established This is strictly speaking a pure question of fact determinable upon the evidence given in the case

*The custom alleged in the pleading was this* —"Among the Jains adoption is no religious ceremony, and under the law or custom there is no restriction of age or marriage among them" And that appears to be the custom found by the High Court to exist But upon the argument before their Lordships it was strenuously contended that the evidence in the present case limited as it is to a comparatively small number of centres of Jain population was insufficient *to establish a custom* so wide as this, and that no narrower custom was either alleged or proved

In their Lordships' opinion there is great weight in these criticisms, enough to make the present case an unsatisfactory

| | |
|---|---|
| Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1903 .. ... ... ... | In Urdu and Nagri. 3 p each (1 a) |
| Act XV of 1856 (Hindu Widows' Re-marriage) .. ... ... | In Urdu 6 p. (1 a) |
| Ditto ditto ... | In Nagri. 6 p (1 a) |
| Act XX of 1856 (Police Chaukidars), as modified up to 1st November, 1903 .. ... ... ... .. | In Urdu 2 a 6 p (1 a |
| Ditto ditto . | In Nagri 2 a 6 p (1 |
| Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 .. ... .. | In Urdu 1 a (1 a) |
| Ditto ditto | In Nagri 1 a (1 a) |
| Act XXXV of 1858 [Lunacy (District Courts)] as modified up to 30th April, 1903 ... .. . . | In Urdu 1 a (1 a) |
| Ditto ditto | In Nagri 1 a (1 a) |
| Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1903 ... .. ... ... ... ... | In Urdu 1 a 6 p (1 a |
| Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874 . ... . ... . | In Urdu 3 p (1 a) |
| Ditto ditto ... | In Nagri 3 p (1 a) |
| Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904 .. . ... .. | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903 | In Urdu Re 1 5 (5 a |
| Ditto ditto | In Nagri Re 1 5 (5 a |
| Act V of 1861 (Police), as modified up to 7th March, 1903 | In Urdu 2 a 9 p (1 a |
| Ditto ditto | In Nagri 2 a 9 p (1 |
| Act XVI of 1861 (Stage carriages), as modified up to 1st February, 1898 | In Urdu 1 a 3 p (1 a |
| Ditto ditto | In Nagri 1 a 3 p (1 |
| Act III of 1864 (Foreigners), as modified up to 1st September, 1906 ... | In Urdu 1 a (1 a) |
| Ditto ditto . | In Nagri 1 a (1 a) |
| Act III of 1865 (Carriers), modified up to 31st May, 1903 ... | In Urdu 9 p (1 a) |
| Ditto ditto ... | In Nagri 9 p (1 a) |
| Act III of 1867 (Gambling), as modified up to 1st December, 1896 . | In Nagri 1 a 3 p (1 a |
| Ditto ditto 1st January, 1905 ... | In Urdu 1 a (1 a) |
| Act V of 1869 (Indian Articles of War), as modified up to 1st January 1895 ... ... . .. . ... | In English Urdu and N Bound Rs 3 (5 a) |
| Ditto ditto .. | Unbound Rs 2 8. (5 |
| Act I of 1871 (Cattle-trespass), as modified up to 1st December, 1903 | In Urdu 1 a 9 p (1 |
| Ditto ditto . | In Nagri 1 a 9 p (1 |
| Act XXIII of 1871 (Pensions) .. . .. | In Urdu 9 p (1 a) |
| Ditto .. .. . .. | In Nagri 9 p (1 a) |
| Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904 .. | In Urdu 2 a 6 p (1 a |
| Act IX of 1872 (Contract), as modified up to 1st September, 1899 .. | In Urdu 9 a 9 p (3 a |
| Ditto ditto . | In Nagri. 9 a. 6 p (3 |
| Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 . ... . . .. | In Urdu 4 a (2 a) |
| Ditto ditto ... | In Nagri. 4 a (2 a) |
| Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903 ... . ... . | In Urdu 9 p (1 a) |
| Ditto ditto .. | In Nagri 9 p (1 a) |
| Act VIII of 1873 (Northern) India Canal and Drainage), as modified up to 15th July, 1899 ... .. .. .. .. | In Urdu. 3 a 3 p (1 |
| Ditto ditto .. | In Nagri 3 a 3 p (1 |
| Act X of 1873 (Oaths), as modified up to 1st February, 1903 ... | In Urdu. 1 a (1 a) |
| Ditto ditto ... | In Nagri. 9 p (1 a) |

uncles for partition of Gaya Prasad Singh's estate In that suit Sahibzad Kunwari was, upon her own application, made a party defendant under section 32 of Act XIV of 1882, and by the decree of the High Court, made on the 12th June, 1895, the joint family property was divided into four equal shares, of which one was allotted to the plaintiff, one to Sahibzad Kunwari, and one each to the two sons of Gaya Prasad Singh

Musammat Sahibzad Kunwari died on the 9th November, 1900, and thereupon the plaintiff, Debi Mangal Prasad, again brought a suit claiming to be entitled to a third share of the fourth share of the family property which had in the previous suit been allotted to Sahibzad Kunwari The defendants, Mahadeo Singh and Sitla Bakhsh Singh, resisted the suit on the ground that the share allotted on partition to Sahibzad Kunwari was her *stridhan* which according to the *Mitakshara* passed to them as her heirs The court below sustained this plea and dismissed the suit The plaintiff appealed to the High Court

The Hon'ble Pandit *Sundar Lal*, for the appellant —The share taken by a Hindu mother under the Mitakshara school on partition among her sons is not what is technically known to the law as *stridhan* In considering the definition of *stridhan* in the Mitakshara (II, 11, 2) we have to bear in mind that Vijnaneshvara uses that term in a non technical sense and that his definition has been found to be too wide The Privy Council in several instances have, as is well known, qualified this definition by excepting "inherited property" from the category of *stridhan* The Mitakshara definition not having been accepted by the Privy Council, it would be proper to restrict the term *stridhan* to the few specific kinds of property mentioned in the text The learned advocate then cited and discussed the case of *Chhiddu v Naubat* (1) The point directly arose in the case of *Bhupal Singh v Mohan Singh* (2), where the question was whether the Hindu widow could be considered as a "proprietor", and it was held that, in accordance with the earlier rulings of this Hon'ble Court she had only a qualified interest, as she got the share in lieu of her maintenance In the case of *Bhupal Singh v. Mohan*

(1) (1901) I L. R., 24 All, 6[illegible] (2) (189[illegible]) I L. R., 19 All., 324 32[illegible]

| | |
|---|---|
| Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1903 | In Urdu and Nagri. 3p (1 a) |
| Act XV of 1856 (Hindu Widows' Re-marriage) | In Urdu 6p (1 a) |
| Ditto ditto | In Nagri. 6p (1 a) |
| Act XX of 1856 (Police Chaukidars), as modified up to 1st November, 1903 | In Urdu 2 a 6 p (1 a) |
| Ditto ditto | In Nagri 2 a 6 p (1 a |
| Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 | In Urdu 1 a (1 a) |
| *Ditto ditto* | *In Nagri 1 a (1 a)* |
| Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903 | In Urdu 1 a (1 a) |
| Ditto ditto | In Nagri 1 a (1 a) |
| Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1903 | In Urdu 1a 6p (1 a) |
| Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874 | In Urdu 3p (1 a) |
| Ditto ditto | In Nagri 3p (1 a) |
| Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904 | In Urdu 3p (1 a) |
| Ditto ditto | In Nagri 3p (1 a) |
| Act XLV of 1860 (Penal Code), as modified up to 1st April, 1903 | In Urdu Re 1 5 (5 a) |
| Ditto ditto | In Nagri Re 1 5 (5 a) |
| Act V of 1861 (Police), as modified up to 7th March, 1903 | In Urdu 2 a 9 p (1 a) |
| Ditto ditto | In Nagri 2 a 9 p (1 a |
| Act XVI of 1861 (Stage carriages), as modified up to 1st February, 1898 | In Urdu 1 a 3 p (1 a) |
| Ditto ditto | In Nagri 1 a 3 p (1 a |
| Act III of 1864 (Foreigners), as modified up to 1st September, 1906 | In Urdu 1 a (1 a) |
| Ditto ditto | In Nagri 1 a (1 a) |
| Act III of 1865 (Carriers), modified up to 31st May, 1903 | In Urdu 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| Act III of 1867 (Gambling), as modified up to 1st December, 1896 | In Nagri 1 a 3 p (1 a |
| Ditto ditto 1st January, 1905 | In Urdu 1 a (1 a) |
| Act V of 1869 (Indian Articles of War), as modified up to 1st January 1895 | In English, Urdu and N[illegible] *Bound Rs 3 (5 a)* |
| Ditto ditto | Unbound Rs 2 8 (5 a) |
| Act I of 1871 (Cattle-trespass), as modified up to 1st December, 1903 | In Urdu 1 a 9 p (1 a) |
| Ditto ditto | In Nagri 1 a 9 p (1 a |
| Act XXIII of 1871 (Pensions) | In Urdu 9 p (1 a) |
| Ditto | In Nagri 9 p (1 a) |
| Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904 | In Urdu 2 a 6 p (1 a |
| Act IX of 1872 (Contract), as modified up to 1st September, 1899 | In Urdu 9 a 9 p (3 a) |
| Ditto ditto | In Nagri. 9 a. 6 p (3 a |
| Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891 | In Urdu 4 a (2 a) |
| Ditto ditto | In Nagri 4 a (2 a) |
| Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903 | In Urdu 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| Act VIII of 1873 (Northern) India Canal and Drainage), as modified up to 15th July, 1899 | In Urdu 3 a 3 p (1 a) |
| Ditto ditto | In Nagri 3 a 3 p (1 a) |
| Act X of 1873 (Oaths), as modified up to 1st February 1903 | In Urdu [illegible] |

of *Chhiddu* v. *Naubat* (1) The facts are these —On the 4th of January, 1893, the plaintiff, who was then a minor, instituted a suit by his mother Musammat Dharamraj Kunwari as guardian for partition of the estate to which he and the defendants were jointly entitled In that case Musammat Sahibzad Kunwari, the grandmother of the plaintiff, applied under section 32 of the Code of Civil Procedure and was made a defendant in the suit According to the allegation contained in paragraph 6 of the plaint in this case the entire family property was, by a decree of the 22nd of January, 1894, which was upheld by the High Court on the 12th of June, 1895, divided into four equal shares, of which one share was allotted to the plaintiff, one share to Sahibzad Kunwari, and one share each to Mahadeo Singh and Sitla Bakhsh Singh The plaintiff is the grandson of Gaya Prasad Singh, whose widow was Sahibzad Kunwari Gaya Prasad Singh left three sons, namely, Sheo Prasad Singh, the father of the plaintiff, Debi Mangal Prasad Singh, and two other sons, namely, the before named Mahadeo Prasad Singh and Sitla Bakhsh Singh

The suit out of which this appeal has arisen is concerned with the one-fourth share which in the earlier suit was apportioned to Sahibzad Kunwari, she having died on the 9th of November, 1900 The plaintiff claims to be entitled to one-third of that share The defendants Mahadeo Singh and Sitla Bakhsh Singh resisted the suit on the ground that the share to which Sahibzad Kunwari was entitled was her *stridhan* and according to the rules of the Mitakshara they as her nearest relatives were entitled to it The court below decided in favour of the defendants and dismissed the plaintiff's claim

The present appeal has been preferred and the contention of the learned advocate for the plaintiff appellant is that under a recent ruling of the Privy Council we must hold that the decision in the case of *Chhiddu* v *Naubat* to which we have referred must be treated as overruled This was a decision of a Bench of this Court, to which one of us was a party. It was to the effect that according to the Mitakshara the share which the mother in a joint Hindu family obtains after the death of the father, on partition of the joint family property between the mother and the

(1) (1901) I L R 24 All., 67

| | |
|---|---|
| Act XIII of 1886 (Securities) as amended by the Repealing and Amending Act, 1891 | In Urdu 9p (1a) |
| Ditto ditto | In Nagri 9p (1a) |
| Act VI of 1887 (Companies Amendment) | In Urdu 8p (1a) |
| Act VII of 1887 (Suits' Valuation) | In Urdu 9p (1a) |
| Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896 | In Urdu 2a 3p (1a) |
| Ditto ditto | In Nagri 2a 6p (1a) |
| Act X of 1887 (Native Passenger Ships) | In Urdu 1a 6p (1a) |
| Act XII of 1887 (Bengal North West Provinces and Assam Civil Courts) | In Urdu 1a 3p (1a) |
| Ditto ditto | In Nagri 1a 3p (1a) |
| Act XIV of 1887 (Indian Marine) as modified up to 15th February, 1899 | In Urdu 3a 6p (1a) |
| Ditto ditto | In Nagri 3a 9p (1a) |
| Act XV of 1887 (Burma Military Police) | In Urdu 9p (1a) |
| Ditto ditto | In Nagri 9p (1a) |
| Act XVIII of 1887 (Allahabad University) | In Urdu 1a (1a) |
| Act III of 1888 (Police) as modified up to 1st March, 1893 | In Urdu 3p (1a) |
| Ditto (as passed) | In Nagri 6p (1a) |
| Act IV of 1888 (Indian Reserve Forces) as modified up to 1st March 1893 | In Urdu 3p (1a) |
| Ditto (as passed) | In Nagri 3p (1a) |
| Act VI of 1888 (Debtors) | In Urdu 6p (1a) |
| Ditto | In Nagri 6p (1a) |
| Act I of 1889 (Metal Tokens) as modified up to 1st April, 1904 | In Urdu 6p (1a) |
| Ditto ditto | In Nagri 6p (1a) |
| Act II of 1889 (Measures of Length) | In Urdu 3p (1a) |
| Ditto | In Nagri 3p (1a) |
| Act IV of 1889 (Merchandise Marks), as modified up to 1st February 1904 | In Urdu 1a 9p (1a) |
| Ditto ditto | In Nagri 2a (1a) |
| Act VI of 1889 (Probate and Administration) | In Urdu 6p (1a) |
| Ditto ditto | In Nagri 6p (1a) |
| Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903 | In Urdu 1a 9p (1a) |
| Act XIII of 1889 (Cantonment), as modified up to 1st March 1895 | In Nagri 3a (1a 9p) |
| Act XV of 1889 (Official Secrets) as modified up to 1st April 1904 | In Urdu 9p (1a) |
| Ditto ditto | In Nagri 9p (1a) |
| Act XVI of 1889 (Central Provinces Land Revenue) | In Urdu 1a 6p (1a) |
| Ditto ditto | In Nagri 1a 6p (1a) |
| Act XX of 1889 (Lunatic Asylums Amendment) | In Urdu 3p (1a) |
| Act I of 1890 (Revenue Recovery) | In Urdu 3p 1a) |
| Act II of 1890 (Amending Acts XVII of 1864 X of 1865 II of 1874 and V of 1881) | In Urdu 3p (1a) |
| Act V of 1890 (Indian Forest and Burma Forest Amendment) | In Urdu 6p (1a) |
| Act VIII of 1890 (Guardians and Wards) | In Urdu 2a 3p (1a 9p) |
| Act IX of 1890 (Railways) as modified up to 1st June 1900 | In Urdu 8a (2a) |
| Ditto ditto May 1896 | In Nagri 8a (2a) |
| Act X of 1890 (Press and Registration of Books Amendment) | In Urdu 3p (1a) |
| Act XI of 1890 (Prevention of Cruelty to Animals) | In Urdu 6p (1a) |
| Act XIX of 1890 (Salt Amendment) | In Urdu 3p (1a) |
| Act XX of 1890 (North Western Provinces and Oudh) | In Urdu 1a (1a) |
| Act X of 1891 (Indian Criminal Law Amendment) | In Urdu 3p (1a) |
| Act XIV of 1891 (Oudh Courts) | In Urdu 6p (1a) |
| Act XVIII of 1891 (Bankers Books Evidence) as modified by Acts I of 1893 and XII of 1900 | In Urdu 3p (1a) |
| Ditto ditto | In Nagri 6p (1a) |

for execution actually pending *Sujan Singh* v. *Hira Singh* (1) followed. *Tarini Das Bandyopadhya* v. *Bishtoo Lal Mukhopadaya* (2) referred to

THE facts of this case were as follows :—

A decree under section 88 of the Transfer of Property Act was passed on the 24th of December, 1889, against the predecessors of the respondents, and on the 11th of September, 1890, an order absolute for sale was passed for Rs. 1,171-13 3 without costs. Several applications for execution were made in 1892 and 1893, and on the 2nd of May, 1899, the execution case was struck off. On the 13th of July, 1901, on an application for execution, an order was sent to the Collector for sale. On the 20th of December, 1901, however, an agreement was filed whereby the decretal amount to be paid was fixed and certain instalments were specified and on default of any instalment the whole amount was to be due. In consequence of this no sale took place. On the 11th of June, 1904, and the 14th of May, 1906, the decree-holder certified payments of two instalments.

The present application for execution was presented on the 1st of April, 1908, and the judgment-debtors objected that it was barred by limitation, not being presented within three years of any preceding application or any step in aid of execution, and that further it was barred by the twelve years' rule laid down in section 230 of the Code of 1882. The lower courts allowed the objection and dismissed the application.

The decree-holder appealed.

Mr. *G. W Dillon*, for the appellant, contended that the decree being one under section 88 of The Transfer of Property Act, section 230 of the Code did not apply. He relied on *Jadunath Prasad* v. *Jagmohan Das* (3). Up to July 1901 the decree-holder had not failed to make applications for execution within three years of each preceding application. The proceeding of the 20th of December, 1901, by which an agreement was certified was a step in aid of execution. The payments which were certified in 1901 and 1904 were also steps in aid of execution. Apart from the question whether an application was pending, a payment certified had the effect of satisfying the decree to that extent, and therefore saved limitation He cited *Sujan Singh* v *Hira Singh* (1)

(1) (1889) I. L. R. 11 All 333 (2) (1885) I. L. R., 12 Calc., 608.
(3) (1903) I. L. R., 25 All., 641.

| | | | |
|---|---|---|---|
| Act I of 1899 [Indian Marine Act (1887) Amendment] | In Urdu. | 6 p | (1 a) |
| Ditto ditto | In Nagri | 6 p | (1 a) |
| Act II of 1899 (Stamps), as modified up to 31st August, 1905 | In Urdu | 7 a. 6 p | (1 a 6 p) |
| Ditto ditto | In Nagri | 7 a 6 p | (1 a 6 p) |
| Act IV of 1899 (Government Buildings) | In Urdu. | 3 p | (1 a) |
| Ditto | In Nagri | 3 p | (1 a) |
| Act VII of 1899 [Indian Steam Vessels Act (1884) Amendment] | In Urdu. | 3 p | (1 a) |
| Ditto ditto | In Nagri | 3 p | (1 a) |
| Act VIII of 1899 (Petroleum), as modified up to 1st January, 1909 | In Urdu | 1 a 6 p | (1 a) |
| Ditto ditto | In Nagri | 1 a 6 p | (1 a) |
| Act IX of 1899 (Arbitration) | In Urdu. | 9 p | (1 a) |
| Ditto | In Nagri | 9 p | (1 a) |
| Act XI of 1899 (Court fees Amendment) | In Urdu | 6 p | (1 a) |
| Ditto | In Nagri. | 6 p | (1 a) |
| Act XII of 1899 (Currency Notes Forgery) | In Urdu | 3 p | 1 a) |
| Ditto | In Nagri | 3 p | (1 a) |
| Act XIV of 1899 (Tariff Amendment) | In Urdu | 3 p | (1 a) |
| Ditto | In Nagri | 3 p | (1 a) |
| Act XVII of 1899 (Indian Registration Amendment) | In Urdu. | 3 p | (1 a) |
| Ditto ditto | In Nagri | 3 p | (1 a) |
| Act XVIII of 1899 (Land Improvement Loans Amendment) | In Urdu | 3 p | (1 a) |
| Ditto ditto | In Nagri | 3 p | (1 a) |
| Act XX of 1899 (Presidency Banks) | In Urdu | 3 p | (1 a) |
| Ditto | In Nagri | 3 p | (1 a) |
| Act XXI of 1899 (Central Provinces Tenancy Amendment) | In Urdu. | 3 p | (1 a) |
| Ditto ditto | In Nagri | 3 p | (1 a) |
| Act XXIV of 1899 (Central Provinces Court of Wards) | In Urdu | 1 a 3 p | (1 a) |
| Ditto ditto | In Nagri | 1 a 3 p | (1 a) |
| Act I of 1900 (Indian Articles of War Amendment) | In Urdu | 3 p | (1 a) |
| Ditto ditto | In Nagri | 3 p | (1 a) |
| Act III of 1900 (Prisoners), as modified up to 1st March, 1905 | In Urdu | 2 a 3 p | (1 a) |
| Ditto ditto | In Nagri | 2 a 3 p | (1 a) |
| Act IV of 1900 [Indian Companies (Branch Registers)] | In Urdu | 3 p | (1 a) |
| Ditto ditto | In Nagri | 3 p | (1 a) |
| Act IX of 1900 (Court Fees Amendment) | In Urdu | 3 p | (1 a) |
| Ditto | In Nagri | 3 p | (1 a) |
| Act X of 1900 (Census) | In Urdu | 9 p | (1 a) |
| Ditto | In Nagri | 9 p | (1 a) |
| Act II of 1901 [Indian Tolls (Army)] | In Urdu | 6 p | (1 a) |
| Ditto | In Nagri | 9 p. | (1 a) |
| Act V of 1901 [Indian Forest (Amendment)] | In Urdu | 3 p. | (1 a) |
| Ditto | In Nagri. | 3 p | (1 a) |
| Act VI of 1901 (Assam Labour and Emigration) | In Urdu | 5 a | (2 a) |
| Ditto | In Nagri | 5 a | (2 a) |
| Act VII of 1901 (Native Christian Administration of Estates) | In Urdu. | 3 p. | (1 a) |
| Ditto ditto | In Nagri | 3 p | (1 a) |
| Act VIII of 1901 (Mines) | In Urdu. | 1 a | (1 a) |
| Ditto | In Nagri | 1 a | (1 a) |
| Act IX of 1901 [Indian Articles of War (Amendment)] | In Urdu | 3 p | (1 a) |
| Ditto ditto | In Nagri | 3 p | (1 a) |
| Act X of 1901 [Court fees (Amendment) | In Urdu | 3 p | (1 a) |
| Ditto | In Nagri. | 3 p | (1 a |
| Act II of 1902 [Cantonments (House Accommodation)] | In Urdu. | 1 a | (1 |
| Ditto ditto | In Nagri | 1 a. | |
| Act IX of 1902 (Indian Tramways) | In Urdu. | 3 | |
| Ditto | In Nagri. | [illegible] | |

application is for execution of the decree absolute of September 11th, 1890, but the decree holder claims to execute the same subject to the terms of the agreement of December 20th, 1901. It is certainly very doubtful whether he can do this in face of this Court's ruling in *Kashi Prasad* v. *Sheo Sahai* (1), where it was held that a decree for sale under the Transfer of Property Act was not capable of adjustment under the provisions of section 257A of the Code of Civil Procedure. We were asked to reconsider this ruling, but it does not seem necessary for us to do so. It may be that the decree holder is not entitled to enforce the agreement of December 20th, 1901, but that his decree of September 11th, 1890 is still alive and capable of execution according to its terms, due allowance being made for any payments since certified. We have to decide at present only the question whether the courts below were right in holding this decree to be time barred. The case depends on the provisions of Article 179(4) of the Second Schedule to the Indian Limitation Act (XV of 1877). We have not to decide whether the certifying of the agreement of December 20th, 1901, was a step in aid of execution. There had been, as already pointed out, an application for execution on July 13th, 1901, the decree holder's application to have payment certified on June 11th, 1904, was within three years of this date and the similar application of May 11th, 1906, was made within three years both of this latter date and of the 22nd May, 1908, when execution of the decree itself was again asked for. The question then narrows itself down to this: Whether the decree holder's applications under section 258 of Act XIV of 1882 can be treated as applications to the Court to take some step in aid of execution of the decree or order. There are two reported cases in the appellant's favour—*Sujan Singh* v. *Hira Singh* (2) and *Tarini Das Bandyopadhya* v. *Bishtoo Lal Mukhopadhya* (3). The only distinctions which can be drawn against the appellant are that in the former case the court laid some stress upon the fact that an application for execution was actually before the court at the time when the payment was certified and that in the latter case the decree holder took the precaution of asking that an execution proceeding which had

(1) (18[illegible]) I. L. R. [illegible] All. 166. (2) (1889) I. L. R., 12 All., 399.
(3) (1886) I. L. R., 12 Calc., 609.

Regulation V of 1890 (British Baluchistan Forests) .. In Urdu 2 a (1 a 6 p)
Regulation VI of 1893 (Hazara Forests) ... ... . In Urdu 2 a (1 a 6 p)
Regulation VIII of 1896 (British Baluchistan Criminal Justice) . In Urdu. 9 p (1 a)
Regulation IX of 1896 (British Baluchistan Civil Justice)... .. In Urdu. 2 a. 8p (1 a)
Regulation III of 1901 (Frontier Crimes) .. . .. In Urdu. 2 a 6 p. (1 a)
Regulation IV of 1901 (Frontier Murderous Outrages) .. ... In Urdu. 6 p. (1 a)
Regulation VII of 1901 (North West Frontier Province) ... .. In Urdu 4 a 3 p (1 a)

## V.—MISCELLANEOUS PUBLICATIONS

Table showing Effect of Legislation in the Governor General's Council during 1898 to 1900 ... .. ... ... Re. 1 (1 a. 6 p)

| | | | |
|---|---|---|---|
| Ditto | ditto | during 1901 | ... 6 a. (2 a) |
| Ditto | ditto | during 1902 | ... 2 a 6 p. (1 a) |
| Ditto | ditto | during 1903 | . 14 a (2 a) |
| Ditto | ditto | during 1904 | . 4 a (2 a) |
| Ditto | ditto | during 1905 | .. 3 p (1 a) |

Annual Indexes to the Acts of the Governor General of India in Council from 1854 to 1905 The price is noted on each

port of Indian Law Commission, 1879 Foolscap, Board ... Re. 1. (5 a)

oceedings of the Council of the Governor General of India for making Laws and Regulations, from July, 1892 to 1905 Super-royal 4to. Annual subscription Rs 5 (Re. 1), single issue 4 a, including postage.

dex to Indian Statutes Chronological Tables and Index of the Indian Statutes, compiled under the orders of the Government of India, by F G Wigley, of the Inner Temple Barrister-at-Law. Edition 1897.

Digest of Indian Law Cases, containing High Court's Reports, 1862 to 1900, and Privy Council Reports of Appeals from India, 1836 to 1900, with an Index of cases compiled under the orders of the Government of India, by J. V. Woodman, of the Middle Temple, Barrister at Law, and Advocate of the High Court, Calcutta. In six volumes. Super-royal 8vo Rs 72 reduced to Rs. 36 for cloth bound and Rs 78 reduced to Rs 39 for quarter bound ... (Rs. 3 12)

Single volume reduced to Rs. 7 when sold separately for the first and five volumes and to Rs 5 for the sixth

A Digest of the Statutes and Acts relating to Merchant Shipping in India, Edition 1884. By T A. Pearson, Barrister-at-Law. ... Rs 5 Reduced to (12 a)

Index to Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895 ... ... ... ... ... 7 a (2 a)

Ditto ditto ... In Urdu and Nagri.

Contents to ditto ... .. ... ... . In Urdu and Nagri. (1 a)

The Baluchistan Agency Forest Law, 1890 .. . In Urdu 2 a (1 a

The Quetta Municipal Law, 1896 .. ... . .. In Urdu. 3 a 3 p (

The Baluchistan Agency Criminal Justice Law, 1896 . In Urdu. 9 p (1 a

The Baluchistan Agency Civil Justice Law, 1896 .. . In Urdu. 2 a 6 p. (

application is for execution of the decree absolute of September 11th, 1890, but the decree-holder claims to execute the same subject to the terms of the agreement of December 20th, 1901. It is certainly very doubtful whether he can do this in face of this Court's ruling in *Kashi Prasad* v *Sheo Sahai* (1), where it was held that a decree for sale under the Transfer of Property Act was not capable of adjustment under the provisions of section 257A of the Code of Civil Procedure We were asked to reconsider this ruling, but it does not seem necessary for us to do so It may be that the decree holder is not entitled to enforce the agreement of December 20th, 1901, but that his decree of September 11th, 1890, is still alive and capable of execution according to its terms, due allowance being made for any payments since certified We have to decide at present only the question whether the courts below were right in holding this decree to be time barred The case depends on the provisions of Article 179(4) of the Second Schedule to the Indian Limitation Act (XV of 1877) We have not to decide whether the certifying of the agreement of December 20th, 1901, was a step in aid of execution There had been, as already pointed out, an application for execution on July 13th, 1901, the decree-holder's application to have payment certified on June 11th, 1904, was within three years of this date, and the similar application of May 14th, 1906, was made within three years both of this latter date and of the 22nd May, 1908, when execution of the decree itself was again asked for The question then narrows itself down to this Whether the decree-holder's applications under section 258 of Act XIV of 1882 can be treated as applications to the Court to take some step in aid of execution of the decree or order There are two reported cases in the appellant's favour—*Sujan Singh* v. *Hira Singh* (2) and *Tarini Das Bandyopadhya* v *Bishtoo Lal Mukhopadaya* (3) The only distinctions which can be drawn against the appellant are that in the former case the court laid some stress upon the fact that an application for execution was actually before the court at the time when the payment was certified and that in the latter case the decree holder took the precaution of asking that an execution proceeding which had

(1) (1896) I. L. R. 19 All 186 (2) (1889) I. L. R., 12 All. 399.
(3) (1886) I. L. R., 12 Calc., 608.

## NOTICE TO SUBSCRIBERS.

In order that an opportunity may be afforded of investigating the cause of the non-delivery of any Part or Parts of the "Indian Law Reports, Allahabad Series." to subscribers, it has been found necessary to give notice that no complaint can be attended to regarding the loss of any Part or Parts unless information be forwarded to the Superintendent, Government Press, Allahabad, within three months after the date of publication: after that date back numbers can be supplied only on full prepayment and not at the reduced rate of Re. 0-5-9 per copy.

---

A DIGEST OF INDIAN LAW CASES: containing High Court Reports, 1862—1886, and Privy Council Reports of Appeals from India, 1836—1886, with an Index of Cases. Compiled, under the orders of the Government of India, by JOSEPH VERE WOODMAN, of the Middle Temple, Barrister-at-Law, and Advocate of the High Court, Calcutta. In five volumes. Price, exclusive of packing and postage, Rs. 10 per volume; quarter-bound copies, Rs. 11.

Copies can be obtained at the Office of the Superintendent of Government Printing, India, Calcutta.

THE facts of this case were as follows —

The plaintiff brought his suit on the basis of a custom of pre emption prevailing in a village on the allegation that he was a co sharer with the vendor and that the vendee was a stranger The defendants pleaded, among other things, that the plaintiff had no right of pre emption The property in dispute was situated in three different mahals (1) Mahal Piyari Kuar *az* mahal Ganeshi Lal, (2) Mahal Piyari Kuar *az* mahal Kaheri, (3) mahal Piyari Kuar *az* mahal Dilsukh The Sub ordinate Judge decreed the plaintiff's suit The defendants appealed Before the lower appellate court the defendants conceded that the plaintiff had a right of pre-emption in respect of the property situated in mahals Piyari Kuar *az* mahal Kaheri and Piyari Kunwar *az* mahal Dilsukh, but denied his right in respect of that situated in mahal Piyari Kuar *az* mahal Ganeshi Lal The District Judge decided it in favour of the defendants and reversed the decree of the court of first instance so far as it related to mahal Piyari Kuar *az* mahal Ganeshi Lal The judgment of the lower appellate court dealing with the point was as follows —

"I am of opinion that the appellants must succeed on this ground At first it appears that there was one village Kolara At the time of the last settlement, several mahals existed, Kaheri, Dilsukh, Ganeshi Lal and others At the time of settlement a separate wajib ul arz was prepared for each mahal, the pre emptive clause of the wajib ul arz of this particular mahal ran as follows —

'*Jo koi hissadar haqiat apni bai ya rehan karna chahe to awal hissadaran ekjaddi ke hath, badahu badast hissadaran digar wa zanbad badast hissadaran i mahal*' and finally to strangers —'If a co sharer should desire to sell or mortgage his property he shall first transfer it to *ek jaddi* co sharers, then to other co sharers and after that to the co sharers of the mahal,' and finally to strangers

"It will be observed that there is some mistake in the transcript As it stands, the second and third categories are the same The third category should be co sharers of other mahals

'Subsequently mahal Ganeshi Lal was partitioned into two mahals Ganeshi Lal and mahals Piyari Kuar *az* Ganeshi Lal

# TABLE OF CASES REPORTED

which is included in mahal Piyari Kuar *az* Ganeshi Lal (of the last partition)

"I set aside the decree of the lower court and in its place decree to the plaintiff possession of the property in mahal Piyari Kuar *az* Kaheri"

The plaintiff appealed

The Hon'ble Pandit *Sundar Lal,* for the appellant The wajib ul arz at the settlement as well as that at first partition recorded a custom of pre emption The heading of the pre emptive clause of the wajib-ul arz is '*rawaj haq shafa &c*' The word '*rawaj*" is a clear expression, it cannot mean anything other than custom There is only a slight change in the language of the two documents, which is not of much material consequence The custom nevertheless remained unabrogated It is clear from the language of the wajib ul arz prepared at the first partition that it recorded a custom of pre emption The further partition of mahal Piyari *az* Ganeshi Lal into sub divisions had not the effect of putting an end to the custom He next contended that, even assuming that the wajib ul arz prepared at the settlement was a record of contract, it must continue to operate as such up till the expiration of the settlement The mere partition during the subsistence of the settlement would not render the contract abortive If the parties intended to abrogate the contract they would have prepared a separate wajib ul arz

The Hon'ble Pandit *Moti Lal Nehru,* for the respondents — There was a variation in the terms of the wajib ul arzes prepared at the settlement and the partition respectively These could not be records of custom If it was a contract, then there is nothing to show that the parties intended to let it continue for the rest of the settlement With reference to the words *rawaj* and *haq,* he cited *Dhanpal* v *Nand Kishore* (1)

STANLEY, C J and PIGGOTT J —We are of opinion that the decision of the learned District Judge is correct He has given reasons for the conclusion at which he arrived and we think that those reasons are sound He is supported in his judgment by the decision of a Bench of this Court, of which one of us was a

(1) L. P A No 22 of 1909 decided on 7th January, 1910

# TABLE OF CASES CITED

1909 framed before any partition of the village had taken place. That wajib-ul-arz gave a right of pre-emption first to a near co-sharer and then to a co-sharer of the village (*hissadar deh*). Subsequently the village was divided by perfect partition. No new wajib-ul-arz was framed. The plaintiffs have no share in the *mahal* which has been sold. The plaintiffs claim to pre-empt as being co-sharers in the village. The suit was decreed by the court of first instance and the decision of that court was affirmed on appeal by the learned District Judge. The vendee comes here in second appeal. The first plea urged is that the wajib-ul-arz relied on records a contract the term of which has come to an end and not a custom. In my opinion the view taken as to this by the courts below is right. I can find nothing in the language of the passage relied on which would indicate that the co-sharers were recording a contract which they then entered into and not an existing custom.

The next plea is that, even if the wajib-ul-arz be the record of a custom, the plaintiffs pre-emptors being no longer co-sharers of the vendors have no right to pre-empt. In my opinion this plea must be sustained. I am unable to distinguish this case from the Full Bench decision in *Dalganjan Singh* v. *Kalka Singh* (1). This case is exactly on all fours with that. As was remarked in the case of *Gobind Ram* v. *Masih-ullah Khan* (2) the custom which prevailed in this case was one which gave a right of pre-emption to persons between whom there was the common bond that they each owned a share of an undivided village and when this common bond was severed by partition the custom ceased to be applicable. That remark applies to the present case. In this view it is unnecessary to consider the plea contained in the sixth ground in the memorandum of appeal. For the respondents it is contended that the appellant cannot maintain this appeal on the ground that he took out of court the money deposited by the plaintiffs. If there is any force in this contention it is met by the fact that there is no evidence before me in support of the allegation. The result is that I allow the appeal and setting aside the decrees of the courts below, dismiss the plaintiffs' suit with costs in all courts.

The plaintiffs thereupon appealed under section 10 of the Letters Patent.

Babu *Durga Charan Banerji* (with him Munshi *Gobind Prasad* and Babu *Girdhari Lal Agarwala*), for the appellants:—

Upon a true construction of the wajib-ul-arz in question the plaintiffs who were *hissadaran deh* (holders of a share in the village) were entitled to pre-empt as against the respondent, who was admittedly a stranger. The custom which was in force when the wajib-ul-arz was prepared could not be modified. It either continued or came to an end. It must continue as a whole and therefore the plaintiffs, notwithstanding partition were sharers in the village and therefore under the custom as

(1) (1899) I. L. R. 22 All., 1. (2) (1903) I. L. R. 26 All. 295.

# INDEX.

over-ruling the two lower courts, that the case was "on all fours with" the case of *Dalganjan Singh* v. *Kalka Singh* (1) and that the decision of the Full Bench in that case governs it If that ruling is applicable, it is binding upon us and must be loyally followed, but let us see what was decided in it The facts of it were these :—The sale which was sought to be pre empted was a sale of seven bighas of land in the village of Serai Sitam and the claim for pre emption was based on the wajib ul arz framed at the last settlement in 1880 1881 The portion of the wajib ul-arz relating to pre emption is contained in chapter II, which is headed "As to the rights of co sharers among themselves based on custom or agreement" Section 13 of the chapter is headed "As to the custom of right of pre emption," and the clause embodying the right runs as follows —"If any *hissadar* wishes to transfer his share (*apna hissa*), first, he will transfer it to his own brother, then to his near relatives, thirdly, to owners in the village who are partners in the same khata (*malik in sharik khata*), fourthly, to sharers in the village (*hissadaran deh*). If none of these purchase, then he is competent to transfer it to any one he likes"

It was decided that in every case the question "whether or how far a contract or a custom of pre emption recorded in the wajib ul arz of an undivided mahal was still in force, or who is entitled to claim the benefit of it, was not capable of any absolute or invariable answer, that it depended in each case upon the proper construction of the terms of the particular contract or the proper interpretation of the particular custom recorded, assuming that there was no evidence of any intention on the part of the co sharers at the time of partition to put an end to the contract or the custom, but that there is a strong presumption against such claims for pre-emption when made after perfect partition by persons who are no longer co sharers of the vendor"

No hard and fast rule, it will be observed, was laid down, and the judgment is of importance more from the lucid review of the authorities by the learned Chief Justice, Sir Arthur Strachey, and the guidance to be found in his judgement in

(1) (1899) I. L. R 22 All., 1

PAGE

over ruling the two lower courts, that the case was "on all fours with" the case of *Dalganjan Singh* v *Kalka Singh* (1) and that the decision of the Full Bench in that case governs it If that ruling is applicable, it is binding upon us and must be loyally followed, but let us see what was decided in it The facts of it were these —The sale which was sought to be pre empted was a sale of seven bighas of land in the village of Serai Sitam and the claim for pre emption was based on the wajib ul arz framed at the last settlement in 1880 1881 The portion of the wajib ul-arz relating to pre-emption is contained in chapter II, which is headed "As to the rights of co sharers among themselves based on custom or agreement" Section 13 of the chapter is headed "As to the custom of right of pre emption," and the clause embodying the right runs as follows —"If any *hissadar* wishes to transfer his share (*apna hissa*), first, he will transfer it to his own brother, then to his near relatives, thirdly, to owners in the village who are partners in the same khata (*malikan sharik khata*), fourthly, to sharers in the village (*hissadaran deh*) If none of these purchase, then he is competent to transfer it to any one he likes"

It was decided that in every case the question "whether or how far a contract or a custom of pre emption recorded in the wajib ul arz of an undivided mahal was still in force, or who is entitled to claim the benefit of it, was not capable of any absolute or invariable answer, that it depended in each case upon the proper construction of the terms of the particular contract or the proper interpretation of the particular custom recorded, assuming that there was no evidence of any intention on the part of the co sharers at the time of partition to put an end to the contract or the custom, but that there is a strong presumption against such claims for pre emption when made after perfect partition by persons who are no longer co sharers of the vendor"

No hard and fast rule, it will be observed, was laid down, and the judgment is of importance more from the lucid review of the authorities by the learned Chief Justice, Sir Arthur Strachey, and the guidance to be found in his judgement in

(1) (1899) I. L. R. 22 All. 1

PAGE.

of any such new wajib-ul-arz the old wajib-ul-arz remains in force, except so far as its provisions are inconsistent with the state of things which the partition has created." That, he observes, was expressly held to be "clear law" by Mr. Justice Blair in *Mithu Lal* v. *Muhammad Ahmad Said Khan* (1) Then he proceeds:—"If the wajib-ul-arz as a whole is not necessarily abrogated by a perfect partition, is there any more ground for holding that the pre-emption clause of it is so abrogated?" Then referring to some of the decisions which appear to lay down a general rule of law that after a perfect partition no claim for pre-emption can be successfully made on the basis of the old wajib-ul-arz, he observes:—"Others going to the opposite extreme, appear to regard partition as a purely fiscal arrangement, concerned exclusively with the collection of the Government revenue, and having no possible bearing upon any contract or custom of pre-emption." Then he remarks:—"Both views appear to me equally open to the objection that they treat as an abstract question of law what is really a question of the construction of a particular contract or the interpretation and application of a particular custom." "Again," later on he observes, "where the clause does not constitute a contract, but records a custom, the question is still one of its true meaning, though in this case, considering that the wording of the clause is often the composition of some ignorant subordinate whose accuracy cannot be assumed, the only safe course is to look to the substance of the thing, and not to attach undue weight to the particular expressions used The question is whether the custom is one which necessarily presupposes the continuance of the co-parcenary body existing at the time when the clause was framed. If the custom recorded is one by which the right of pre emption is confined to co sharers of the then existing mahal, then it appears to me that it can no more exist in favour of others after the mahal and that particular co-parcenary body have been destroyed by perfect partition, than any other custom can continue after the class among which it has always prevailed has perished. On the other hand, it is possible to imagine a custom of pre emption which does not depend upon the continued existence of the undivided mahal and its co-parcenary

(1) Weekly Notes, 1899, p. 19.

with the vendor, the proposition is in my opinion open to objection. The effect of it would be to break up the custom into as many customs as there are mahals. This cannot be. A custom must prevail in its entirety or not at all. Then he states :—"The inference which I draw is that while it depends in every case on the particular circumstances, and especially upon the terms of the particular wajib-ul arz, whether or how far pre-emption can be claimed under it after a perfect partition, there is a strong presumption against such a claim when made by persons who are no longer co-sharers of the vendors."

Now it must be borne in mind that in the wajib-ul-arz with which the learned Chief Justice was dealing the right of pre-emption was a right of co-sharers "among themselves." These words "among themselves" indicate that to enjoy a right of pre-emption the claimant must not merely be a sharer in the village which has been partitioned, but there must be between him and the vendor this common bond, namely, that they 'each own a fractional share of an integer made up of all the shares held by each.' As to the presumption which in the view of the learned Chief Justice existed against a claim for pre-emption made by persons who are no longer co sharers of the vendors, any such presumption, whatever its strength be, must, as it seems to me, yield to evidence; it has no place for consideration when there is clear evidence to rebut it.

Referring to the passage in the judgement in the case of *Motee Sah* v. *Musammat Goklee* (1), namely, that an essential condition of the existence of a right of pre-emption is that the parties claiming such a right shall be co-parceners in the same estate as those against whom the claim is made, a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established, the learned Chief Justice observed :—"I infer that the wajib-ul-arz in that case confined the right of pre-emption to co-parceners of the vendor, and that after the partition the plaintiff was not such a co-parcener in one of the new mahals Upon that assumption the decision was no doubt right. *If however the passage means that whatever the terms of the wajib-ul-arz, no one can in any case successfully*

(1) (1851) S. D. A, N.-W. P., Vol. I, 506.

PAGE.

pre emption clause was copied *verbatim* from the old wajib ul arz At that time one of the new mahals belonged to a single owner Upon the sale of property in that mahal a suit for pre emption was brought by a person who was a co-sharer in another of the new mahals Mahmood, J, held that the plaintiff was entitled to pre empt as a co sharer of the mauza, notwithstanding the partition and the fact that he was not a co sharer of the vendor in the mahal in which the property sold was situate The comment of the learned Chief Justice upon this decision is—"Whether Mr Justice Mahmood's conclusions in that particular case were correct or not, I cannot doubt that his method of deciding it upon the construction of the contract contained in the wajib ul arz was the right one" This, it is to be observed, was the case of a right of pre emption existing by contract and not by custom, but it is useful as a guide in the case of a claim for pre emption existing by custom

Then later on he commented upon the case of *Mithu Lal* v *Muhammad Ahmad Said Khan* (1), which was decided by Blair and Aikman, JJ. The suit in that case was based on a pre emption clause recording a custom of pre-emption in favour of co sharers in the village The village was, at the time when the wajib-ul arz was framed, an undivided mahal It was afterwards divided by perfect partition into two separate mahals and no new wajib ul-arz was framed The plaintiffs and the vendors were co sharers in the mahal in which the property sought to be pre empted was situate The vendee was sole proprietor of the other mahal, his only connection with the other being that he owned in it certain rent free land The court held in substance that the old wajib ul arz and the old custom still remained in force in so far as they were not inconsistent with the state of things created by the partition The Chief Justice says as to this that the Judges took for granted that "co sharers in one of the separate mahals were co sharers in the village within the meaning of the wajib ul arz" but did not discuss the question Then he observes —"All depends on what the wajib-ul arz meant by 'co-sharers in the village' If it included all persons who might thereafter be co sharers in any

(1) Weekly Notes 1899 p 19.

existing by custom, the right must after perfect partition continue to prevail in its entirety, or else be treated as having fallen into abeyance, or as having been extinguished. I find in it no support for the proposition that a custom of pre emption can be treated as liable to modification by perfect partition, that is, that it "must be held to be subject to such modifications as were rendered necessary by the partition" It is further clear from the language of the Chief Justice that his view, in which the other members of the court concurred, was that the question how far a custom of pre emption recorded in the wajib-ul arz of an undivided mahal was still in force, or who was entitled to claim the benefit of it, depended in each case upon the proper interpretation of the particular custom recorded He attempted to lay down no rigid rule on the subject, but on the contrary carefully abstained from doing so. In *Dalganjan Singh's* case a key to the meaning of the wajib-ul-arz was found in the heading to the portion of it relating to pre-emption, namely, "As to the rights of co-sharers among themselves based on custom or agreement." The words "co-sharers among themselves" indicate that not sharers in the village merely, but co sharers in the village between whom the common bond exists, namely, that each owns a share of an integer made up of the shares held by all, was intended. In the case of *Sahib Ali* v *Fatima Bibi*, to which I have already referred, for similar reasons the ruling in *Dalganjan Singh's* case was applicable and was followed by myself and my brother Banerji.

In the case of *Ram Din* v. *Pokhar Singh* (1) the custom of pre-emption relied upon ran as follows:—"If a co sharer is desirous of transferring his share, he shall transfer it first to his near relative and next to sharers in the village (*hissadar deh*), and then on their refusal he may mortgage or sell it to any one he likes" It was held by my brother Banerji, and I think rightly, that upon a true construction of the wajib ul-arz coupled with a clause in a later wajib-ul arz to the effect that the parties accepted the right of pre-emption, the two documents amounted to a record of a custom of pre emption prevailing in the village and that a near relative need not also be a co-sharer. It was contended before him that a near relative could not pre-empt

(1) (1905) I. L. R., 27 All., 553.

# PRIVY COUNCIL

---

GHAZANFAR ALI KHAN (PLAINTIFF) *v* KANIZ FATIMA AND ANOTHER (DEFENDANTS)

[On appeal from the court of the Judicial Commissioner of Oudh at Lucknow]

*Muhammadan law—Marriage—Absence of direct evidence of marriage—Presumption of marriage—Long cohabitation—Effect on such presumption of alleged wife having been a prostitute when brought to alleged husband's house—Acknowledgement of woman as wife—Marriages of daughters to respectable men*

In this case the appellant's success depended on his proving his status as the legitimate son of his parents

*Held* by the Judicial Committee (upholding the decision of the Judicial Commissioner's Court) that there was no evidence of marriage between them and the presumption of marriage which might have arisen from their prolonged cohabitation did not apply because the mother before she was brought to the father's house was admittedly a prostitute

Instances of alleged acknowledgement by the father of the mother as his wife and the fact that two of the appellant's sisters who were in the same case as to their legitimacy as he was were married to respectable men with due formalities, were held, under the circumstances insufficient to affect the question favourably for the appellant

APPEAL from a judgement and decree (23rd July, 1906) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (3rd August, 1905) of the Subordinate Judge of Sitapur, and dismissed the appellant's suit

The suit was brought against the respondents for the possession of an 8 anna share of a village named Bambhauri, which, with other immovable property, had belonged to his father Muzaffar Ali Khan, who died on 8th April, 1890, leaving him surviving a brother Nasir Ali Khan, Zohra Bibi his widow, who was childless, Phundan who claimed to be his second wife, and the plaintiff (appellant) a son and five daughters born to him of Phundan On his father's death the plaintiff eventually obtained possession of the rest of the property, but his uncle Nasir Ali Khan took possession of the 8 anna share of Bambhauri, and in June, 1890, mutation of names was made in his favour by the revenue court in respect of that share Nasir Ali Khan died in September, 1900, leaving a daughter named Kubra Bibi, to whom, as alleged by the defendant, he had made a gift of all his

---

*Present* —Lord MACNAGHTEN Lord COLLINS, Sir ARTHUR WILSON, and Mr. AMEER ALI.

There is nothing whatever to be found in the wajib ul arz, so far as I have been able to discover, to qualify the meaning of the expression *hissadar deh*, and, as I have said, there is no evidence outside the wajib ul arz to furnish us with any guidance *Deh* means a definite area of land with houses upon it Its equivalent "*mauza*," is defined in Wilson's Glossary as "one or more clusters of habitations and all the lands belonging to their proprietary inhabitants" Every one who owns a portion of that area has a share in the village and is a *hissadar* *Hissadar* primarily means "one who owns a share, *hissa*" In the pre emptive paragraph a preferential right of pre-emption is given to a *hissadar karib*, and in case of his refusal to another (*dusre hissadar deh*) The word "another" furnishes a key to the meaning of *hissadar* as used in the earlier part of the paragraph. That meaning is "sharer in the village" The paragraph amplified would run thus —"If any sharer in the village (*hissadar*) wishes to sell or mortgage his *haqiat*, he must do so first to a sharer in the village who is a relation (*hissadar karib*) and in case of his refusal to another sharer in the village (*hissadar deh*)" In this wajib ul arz there is no such context to be found as in *Dalganjan Singh's* case rendered the meaning of 'co-sharer' appropriate to the word *hissadar* The custom in this case sprang up at a time when presumably it was not in the contemplation of the sharers in the village that the village would be broken up into distinct parcels by partition The meaning of the expression *hissadar deh* meant in the eyes of the villagers a sharer in the village

What then is the effect of perfect partition upon a custom under which the sharers in a village are entitled to pre empt? The old custom cannot be treated as capable of modification to meet the altered circumstances A custom must not merely be ancient but it must be continuous uninterrupted, uniform, certain and definite Unless the effect of partition is to extinguish the custom, it must prevail in its entirety If we qualify the expression *hissadar deh* as used in the wajib-ul arz by a condition that a *hissadar* who claims a right of pre emption must be a co sharer in the mahal in which the property sought to be pre-empted is situate, we shall be

Musammat Phundan was preceded by any legal union, and in support of this contention he has cited the case of *Jariatool Butool* v *Hoseinee Begam* (1). He has also contended that when Muzaffar Ali Khan gave evidence in 1883 he was obliged, when questioned about this second woman, to say that she was his wife because he would be ashamed to say in open court that he was keeping a prostitute together with his wife, and secondly, because his evidence would have been useless for the object with which he was called unless he had declared that Musammat Phundan was his wife. It is also contended that there is ample evidence to show that Musammat Phundan continued to carry on her profession as a dancing girl long after 1870, the year during which it is alleged that the marriage took place. The evidence of the witnesses called to prove that Musammat Phundan continued to dance at marriages and other ceremonies after 1870 does not impress me in the least, but there is one important fact which throws great doubt on the alleged marriage in 1870. When the case was instituted early in 1903 the pleader for the plaintiff alleged that the marriage had taken place about 20 years before that is, about 1882. This date was put back to 1870 by a statement subsequently made in December 1902. If any marriage had really been celebrated in 1870, is it possible that Musammat Phundan or any of her friends had no knowledge of the exact date and could not fix it accurately at once when the cases were called on for hearing? I refer also to the evidence of Daryao Lal witness No 16, for the defendants, who was in the employ of Muzaffar Ali Khan for 38 years. He says the eldest daughter was born in 1876, the second in 1877, the third in 1879, the fourth fifth and sixth in rapid succession annually probably up to 1882. The plaintiff Ghazanfar Ali appears to have been born some years later probably 1883 or 1884. Now to my mind it is extremely improbable that if regular cohabitation had commenced between Musammat Phundan and Muzaffar Ali Khan in 1870 after the alleged marriage, there would have been no issue of this marriage until 1876. Evidently Musammat Phundan was a young woman then who would, in the ordinary course of nature be likely to give birth to a child within a year or 15 months after cohabitation commenced, and my opinion therefore is that no cohabitation took place between Musammat Phundan and Muzaffar Ali Khan until 1875. Then Musammat Phundan being a prostitute Muzaffar Ali Khan found it an easy task to induce her to consent to live with him and afterwards when her children appeared in rapid succession and no children were born to his legal wife Musammat Zohra, Muzaffar Ali Khan *considered it advisable* to make the best of the existing state of affairs and therefore gave out that he was married to Musammat Phundan and recognized her as his wife whenever he spoke about her. In order to provide maintenance for her after his death he had an 8 anna share in Sidrawan [illegible] in her name in 1887 at a time when she had given him six daughters. This was evidently done as a provision for this family. It is true that in his petition in this matter he describes Musammat Phundan as '*zouja apni*' but he does not describe her as '*zouja mankuha apni*'. If Muzaffar Ali Khan had then regarded her as his legal wife why was it necessary to make this special arrangement? Under Muhammadan Law, on his death, she would have succeeded to a share of

(1) (1867) 11 Moo I A, 194

he relied on was one which gave a right of pre-emption to persons between whom there was the common bond that they each owned a share of an undivided village, then his suit failed, inasmuch as in that case the custom had ceased to be applicable, but that if, on the other hand, the custom still prevailed, then the vendees respondents stood on the same level as regards pre emption as the plaintiff, and in either view the plaintiff's suit failed A perusal of the entire passage shows what was intended to be conveyed It appears to me that the learned Judge imposes a heavier burden on the decision in *Dilganjan Singh's* case than it was intended to bear In it the particular wajib-ul-arz before the court was construed and stress was laid upon language used in it which was held to support the decision arrived at No such language is to be found in the wajib ul arz before us We have not got here the words "*apna hissa*" unaccompanied by the word "*deh*" We have no such heading to the chapter in which the clause as to *pre-emption* is included as was found in *Dalganjan Singh's* case, namely, "rights of co sharers *inter se*" We have simply to interpret the words *hissadar deh* as they appear in the wajib ul arz without qualification The term "*hissadar deh*" is clear and unambiguous, and means a sharer in the village Partition as regards such sharers has not made a radical change, they are as closely united as before, and there is still the distinction between them and strangers which it is the object of pre emption to preserve The common bond of membership in the village community still subsists Whatever presumption there may be against a claim for pre-emption when advanced by a person who is no longer a co-sharer of the vendor, no such presumption ought in my opinion to be allowed to prejudice or affect clear, unambiguous and unqualified words such as are to be found in the wajib-ul arz before us In my opinion the learned Judge of this Court was wrong in overruling the decisions of the lower courts

In coming to this conclusion I am guided by the language of the judgments in *Dilganjan Singh's* case and am in no way questioning the authority and binding nature of that decision In the wajib-ul arz then before the Court language

*Khan* v *Lalli Begum* (1) and *Bise* v. *Sunduloonissa Chowdhranee* (2)

*De Gruyther, K C*, and *S A Kyffin*, for the respondents, contended that the appellant had entirely failed to prove that he was the legitimate son of his parents There was no direct evidence of their marriage, and their long cohabitation which was relied upon to give rise to a presumption of their marriage did not under the circumstances allow such a presumption to be raised, as Musamma Phundan had been admittedly a prostitute The appellant therefore having been born out of wedlock was illegitimate Reference was made to *Mahomed Bauker Hossain Khan* v *Shurfoon Nissa Begum* (3), Sir Roland Wilson's Mahomedan Law 3rd Ed page 162 paragraph 84, and *Ashrufood Dowlah Ahmed Hossein Khan* v *Hyder Hossein Khan* (4)

There was no evidence of repute in this case except the marriages of Muzaffar Ali Khan's daughters, and that was insufficient to prove the appellant's legitimacy The decision of the Judicial Commissioners should be upheld for the reasons given in their judgement

*Ross* replied, citing Mr Ameer Ali's Mahommedan Law, Volume II, page 332, and Sir Roland Wilson's Muhommedan Law, 3rd Ed, page 98, paragraph 17, as to the meaning of the word "*nikah*".

1910, *April 29th* The judgement of Their Lordships was delivered by SIR ARTHUR WILSON —

This is an appeal from a judgement and decree of the Court of the Judicial Commissioner of Oudh, which overruled the decision of the Subordinate Judge of Sitapur

The suit out of which the appeal arises was brought by the present appellant in the last mentioned court to establish title to and recover possession of an eight-anna share in the village of Bambhauri, the plaintiff's claim being based upon his alleged right to recover the property in question as heir to his father, Chaudhri Muzaffar Ali Khan About the parentage of the

(1) (1881) I L R 8 Calc 422 L R, 9 I A 8
(2) (1867) 11 Moo I A 177
(3) (1860) 8 Moo I A 136 (159)
(4) (1866) 11 Moo I A 94 (113, 114)

may be conclusive This view was also held by Knox and Aikman, JJ in *Abdul Hai* v. *Nain Singh* (1)

The learned Judges constituting the Full Bench then proceeded to consider whether the custom recorded in the wajib ul arz relied upon in that case was applicable to the altered state of things which arose after partition, and answered that question in the negative upon a true construction of the terms of the wajib ul arz The provisions of the wajib-ul-arz of 1272 Fasli on which reliance is placed in the case before us are in my opinion substantially the same as those of the wajib ul-arz in the Full Bench case and must be construed in the same way The wajib ul arz of 1272 Fasli provides as follows —" If any *hissadar* wishes to sell or mortgage his *haqiat* (right) he should first inform his near share-holders and on their refusal, his other co-sharers in the village (*dusre hissadaran deh*) and sell or mortgage for proper price" In the case of *Dalganjan Singh* v *Kalka Singh* the terms of the wajib ul arz as set forth in the judgment of the learned Chief Justice, were these —"If any *hissadar* wishes to transfer his share (*hissa*), first, he will transfer it to his own brother, * * * fourthly, to the *hissadar deh*" The question in that case, as in this, was whether a person holding a share in the village, but not in the same mahal as the vendor, had a right of pre-emption after the partition of the village The learned Chief Justice, Sir Arthur Strachey, who delivered the principal judgment in the case, held that the words *hissadar deh* in that wajib ul-arz meant "a co sharer of the undivided village for which the wajib-ul arz was framed" And he came to this conclusion upon, as he says, "two main considerations" The first was that "the word *hissadar* as used in the fourth category of pre emptors (*hissadaran deh*) must be construed in the same sense as the same word in the opening words of the clause 'if any *hissadar* wishes to transfer his share'" He then held that the opening words of the clause meant "if any co-sharer in this mahal wishes to transfer his share therein" and that "the subsequent words '*hissadaran deh*' mean 'co-sharers of the undivided village,' not 'owners of shares in any sub-division of the village'" The second consideration which

(1) (1897) I. L. R., 20 All., 192.

SHEORAJ KUNWAR (REPRESENTATIVE OF THE PLAINTIFF) v. HARIHAR BAKHSH SINGH AND ANOTHER (DEFENDANTS)

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.]

*Pre emption suit for—Act No XVIII of 1876 (Oudh Laws Act), section 9 clauses (1) and (2) and proviso as to drawing lots—Act No XVII of 1876 (Oudh Land Revenue Act)—"Mahal" definition of—"Co sharer in subdivision of tenure in which property in suit was comprised"—"Co sharer in whole mahal"*

At the summary settlement of Oudh the taluq in which the property in suit (three villages and two pattis or parts of villages) was comprised was settled with the father of the first respondent as taluqdar, but at the regular settlement in 1864 he came to a compromise with two other claimants by which he took half the taluq as superior proprietor and the other half was assigned in equal shares to the other claimants, who were his relatives, in under proprietary right, they paying the Government revenue plus 10 per cent to the taluqdar and being jointly liable to him in respect of the same as rent. One of these two died childless and his share devolved upon the other one, and on the death of the latter both shares descended to the appellant (his son) and the second respondent (his grandson). Between these two in 1893 a partition took place under which the three villages and the two pattis were assigned to the second respondent and a decree and mutation of names was made in accordance with the partition but no separate engagement was made for payment of the Government revenue in respect of the property so assigned. In 1902 the second respondent sold the property in question to the first respondent, who had succeeded his father as taluqdar. In a suit by the appellant against the respondents claiming the right of pre emption under section 9 of the Oudh Laws Act (XVIII of 1876) *Held* (affirming the decision of the majority of the Court of the Judicial Commissioner) that the meaning attributed to the term "mahal" in the judgment of the officiating Judicial Commissioner (Mr. CHAMIER), namely, "any parcel or parcels of land which have been separately assessed to, or are held under a separate engagement for, the revenue, and for which a separate record of rights has been prepared," was the proper meaning of the word in the Oudh Laws Act, and therefore, although the second respondent and the appellant may have been jointly liable to the first respondent for the Government revenue plus malikana as the rent of the villages and pattis assigned under the compromise of 1864, they were not at the date of the sale to the first respondent co sharers in any subdivision of the tenure in which the property in suit was comprised (under clause 1 of section 9), or in the whole mahal (under clause 2 of that section).

The appellate court in India found that the appellant and the first respondent had an equal right to pre emption of the two pattis, and that under the proviso to section 9 they must draw lots to determine which of them should be entitled to exercise the right. This being done the right to purchase fell to the first respondent, and the appellant consequently lost the right to pre empt.

---

*Present* —Lord MACNAGHTEN, Lord COLLINS, Sir ARTHUR WILSON and Mr. AMEER ALI.

virtue of such a custom the plaintiff, who is the holder of a share in the village, but not a co sharer of the vendor, has no right of pre emption." I see no reason to alter the opinion there expressed, and, as I have said above, I cannot distinguish the case before us from the Full Bench case of *Dalganjan Singh* v. *Kalka Singh*. I feel myself bound to follow the interpretation of the words *hissadaran deh* adopted by five learned Judges in that case. I would, therefore, dismiss the appeal.

BY THE COURT.—In view of the provisions of the Letters Patent the order of the Court is that the decree of the learned Judge of this Court be set aside and the decree of the lower appellate court be restored. The parties will abide their own costs in the High Court.

*Appeal allowed.*

---

3 *Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

GULBA (DEFENDANT) v. BASANTA AND ANOTHER (PLAINTIFFS) AND KISHAN LAL (DEFENDANT).*

*Parties—Persons having the same interest in the subject matter of the suit—Civil Procedure Code, 1882) section 30.*

Where numerous persons are similarly interested in the subject matter of a suit, a suit brought by one or more of such persons for the protection of the rights of all is not bad because the plaintiffs may not have obtained the permission of the court under section 30 of the Code of Civil Procedure, 1882, to sue on behalf of all the persons so interested. *Zafaryab Ali* v. *Bakhtawar Singh* (1) and *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* (2) followed.

THE facts of the case are fully stated in the judgment of the court.

Mr. *A. H. C. Hamilton*, for the appellant.

Munshi *Gulzari Lal*, for the respondents.

STANLEY, C. J. and BANERJI, J.—The facts which gave rise to the suit in this case are these. Kishan Lal, defendant, mortgaged a *chaupal* to Gulba, appellant. A decree was obtained upon the mortgage on the 20th of August, 1907. Thereupon the plaintiffs, who are two of the members of the Lodh caste, brought the suit which has given rise to this appeal for a declaration that

* Second Appeal No. 921 of 1909 from a decree of Muhammad Husain, Officiating Additional Subordinate Judge of Aligarh, dated the 8th of July 1909, reversing a decree of Kunwar Sen, Munsif of Bulandshahr, dated the 8th of April [illegible].

(1) (1883) I. L. R., 5 All., 497. (2) (18[illegible]) I. L. R., 24 Calc., 385.

and lands to be held by them as representing their shares The villages now in suit fell to the share of Uman Prasad Singh On the death of Ganga Bakhsh Singh the first respondent Harihar Bakhsh Singh succeeded to his estate Bishe har Bakhsh Singh died in 1865, and on the death of his widow in 1879, Uman Prasad succeeded to his property On the death of Uman Prasad his two surviving sons Jang Bahadur Singh and Ganesh Bakhsh Singh succeeded him, the former of whom died leaving him surviving a son Gadadhar Bakhsh Singh

Disputes then arose between Ganesh Bakhsh Singh and Gadadhar Bakhsh Singh and were referred to Harihar Bakhsh Singh for settlement as arbitrator He made an award, dated 8th June, 1893, dividing the whole property of Uman Prasad between the disputants and in that division all the villages in suit fell to Gadadhar Bakhsh Singh's lot On 15th November, 1893, the Deputy Commissioner of Sitapur ordered mutation of names to be made in accordance with the possession taken under the award, and on 21st March, 1895, the award was made a decree of court.

On 13th September, 1902, Gadadhar Bakhsh Singh sold the three villages and the two pattis to Harihar Bakhsh Singh, and, thereupon, on 4th September, 1903, Ganesh Bakhsh Singh instituted the present suit

The plaintiff alleged that the whole of the landed property in the possession of Uman Prasad constituted one entire under-proprietary tenure and one mahal within the meaning of the Oudh Laws Act (XVIII of 1876), and that notwithstanding the partition of 1893 he was a co sharer with Gadadhar Bakhsh Singh in the said tenure and mahal, and claimed a right to pre empt the property sold

In defence Harihar Bakhsh Singh denied that the plaintiff and Gadadhar Bakhsh Singh held any portion of the property in suit jointly, and denied the plaintiff's right to pre-emption on the ground asserted, and alleged that even if he had such a right he was estopped from claiming it as he had refused to purchase when asked to do so

The only question now material is whether the plaintiff had the right he claimed to pre emption of the property in suit.

enabling section and does not debar some of the members of a community from maintaining a suit in their own right. In the present case the plaintiffs alleged that the mortgage made by Kishan Lal, the first defendant, was calculated to interfere with their rights as some of the members of the Lodh community. Section 42 of the Specific Relief Act empowers a person entitled to any right in any property to institute a suit against any one denying his title to such right and the court may make a declaration that he is so entitled. As the plaintiffs alleged that their title to the property as part owners of the *chaupal* had been interfered with by the mortgage, they in our opinion are entitled to bring a suit for the protection of their rights. The principle of the ruling in *Zafaryab Ali* v. *Bakhtawar Singh* (1) seems to us to apply to this case. That was a suit by certain Muhammadans to set aside a mortgage of endowed property belonging to a mosque and a decree enforcing the mortgage. It was held that the plaintiffs were entitled to maintain the suit. Another case which has an important bearing on the question before us is that of *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* (2). In that case the plaintiffs who alleged themselves to be members of a priestly community called *Gayawals* of the town of Gaya, and were the *panch* or representative committee of their community, sued for the removal of masonry structures raised by one member of the community. It was held that section 30 of the Code was an enabling section and did not debar the plaintiffs from suing in their own right for the relief claimed.

We are therefore of opinion that the Court below was right in holding that the plaintiffs were entitled to maintain the suit, and that section 30 of the old Code of Civil Procedure did not bar it.

There was one question however raised by the defendants in their defence, namely, that the amount of the mortgage was received for the construction of the *chaupal*, which has not been determined. If the appellant's mortgagor represented the Lodh community in the management of the *chaupal* and if he borrowed money for the repairs of the *chaupal*, the mortgage might be enforceable against the mortgagor and the mortgaged property

(1) (1883) I. L. R. 5 All. 497 (2) (1897) I. L. R. 24 Calc., 385

which is made in all or, at any rate, most under proprietary mahals, that is to say, the Government revenue plus a percentage

"It appears to me that the result of the compromise at Settlement and the proceedings which followed it has clearly been to constitute an under proprietary mahal in which Ganesh and Gadadhar are co-sharers and in which under the revenue law either has a right of pre emption if the other sells to an outsider

"The principle of the right of pre emption is that where there is any community, especially a community which is jointly liable for a payment to anyone else, whether of rent or revenue there should be a right to exclude outsiders, and the taluqdar is clearly an outsider as far as the under proprietary community is concerned. I think therefore that the plaintiff has certainly a right of pre emption as a co-sharer in an under proprietary mahal

"It is possible that as both the sharers are jointly responsible for payment of the rent to the taluqdar on default in respect of any village, they may be considered each to have a share in every village according to the view taken by the Subordinate Judge but on this point I feel considerable doubt and I think it is sufficient for the determination of this case to hold that the plaintiff is entitled to pre-empt as a co-sharer in the under proprietary mahal"

MR. CHAMIER was of opinion, as to the two pattis, "that there could be no question that the plaintiff and Harihar Bakhsh Singh had equal right of pre emption under the third clause of section 9 of the Oudh Laws Act and must draw lots, supposing that the first and second clauses do not apply" and his judgement continued:—

"But the plaintiff contends that he is entitled to pre empt under the first or failing that, the second clause of the section

"As regards the first clause it seems sufficient to say that even if as has been suggested, each of the villages assigned to Uman Prasad is a sub division of the tenure it cannot be said that the plaintiff and Gadadhar are now co sharers in any sub division for under the partition Gadadhar alone is entitled to the three entire villages and Harihar Bakhsh is entitled to the remaining pattis in the villages Himmatnagar and Kathwa It is said with truth that since the partition the position of Ganesh and Gadadhar has been analogous to that of the co sharers of an ordinary proprietary mahal which has been the subject of an imperfect partition under the Revenue Act But it seems to me that the analogy of an imperfect partition does not help the plaintiff so far as the claim under the first clause of section 9 is concerned, for, when upon a partition of an ordinary proprietary mahal each of several pattis is assigned to a different co-sharer and some land is left joint and all the co sharers remain jointly liable for the revenue, each patti becomes a sub division of the tenure but the holder of one patti has never been regarded as a co sharer in a patti assigned to another person The holders of the different pattis can in such a case only claim pre emption against each other as co sharers of the whole mahal under the second clause of the section I think, therefore that the plaintiff cannot claim pre emption under the first clause of the section

"The question whether the plaintiff can claim to pre-empt under the second clause of the section is one of greater difficulty The word mahal is not defined in

enabling section and does not debar some of the members of a community from maintaining a suit in their own right In the present case the plaintiffs alleged that the mortgage made by Kishan Lal, the first defendant, was calculated to interfere with their rights as some of the members of the Lodh community Section 42 of the Specific Relief Act empowers a person entitled to any right in any property to institute a suit against any one denying his title to such right and the court may make a declaration that he is so entitled As the plaintiffs alleged that their title to the property as part owners of the *chaupal* had been interfered with by the mortgage, they in our opinion are entitled to bring a suit for the protection of their rights The principle of the ruling in *Zafaryab Ali* v. *Bakhtawar Singh* (1) seems to us to apply to this case That was a suit by certain Muhammadans to set aside a mortgage of endowed property belonging to a mosque and a decree enforcing the mortgage It was held that the plaintiffs were entitled to maintain the suit Another case which has an important bearing on the question before us that of *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* (2) In that case the plaintiffs who alleged themselves to be members of a priestly community called *Gayawals* of the town of Gaya, and were the *panch* or representative committee of their community, sued for the removal of masonry structures raised by one member of the community It was held that section 30 of the Code was an enabling section and did not debar the plaintiffs from suing in their own right for the relief claimed

We are therefore of opinion that the Court below was right in holding that the plaintiffs were entitled to maintain the suit, and that section 30 of the old Code of Civil Procedure did not bar it

There was one question however raised by the defendants in their defence namely, that the amount of the mortgage was received for the construction of the *chaupal*, which has not been determined If the appellant's mortgagor represented the Lodh community in the management of the *chaupal* and if he borrowed money for the repairs of the *chaupal*, the mortgage might be enforceable against the mortgagor and the mortgaged property

(1) (1883) I L. R. 5 All., 497 (2) (1897) I. L. R. 24 Calc., 385

which is made in all or, at any rate, most under proprietary mahals, that is to say, the Government revenue plus a percentage

"It appears to me that the result of the compromise at Settlement and the proceedings which followed it has clearly been to constitute an under proprietary mahal in which Ganesh and Gadadhar are co-sharers and in which under the revenue law either has a right of pre-emption if the other sells to an outsider.

"The principle of the right of pre-emption is that where there is any community, especially a community which is jointly liable for a payment to anyone else, whether of rent or revenue there should be a right to exclude outsiders, and the taluqdar is clearly an outsider as far as the under proprietary community is concerned. I think therefore that the plaintiff has certainly a right of pre-emption as a co sharer in an under proprietary mahal.

"It is possible that as both the sharers are jointly responsible for payment of the rent to the taluqdar on default in respect of any village, they may be considered each to have a share in every village according to the view taken by the Subordinate Judge but on this point I feel considerable doubt, and I think it is sufficient for the determination of this case to hold that the plaintiff is entitled to pre-empt as a co-sharer in the under-proprietary mahal"

MR CHAMIER was of opinion, as to the two pattis, "that there could be no question that the plaintiff and Harihar Bakhsh Singh had equal right of pre emption under the third clause of section 9 of the Oudh Laws Act and must draw lots, supposing that the first and second clauses do not apply" and his judgement continued:—

"But the plaintiff contends that he is entitled to pre empt under the first or, failing that, the second clause of the section

"As regards the first clause it seems sufficient to say that even if, as has been suggested, each of the villages assigned to Uman Prasad is a sub division of the tenure, it cannot be said that the plaintiff and Gadadhar are now co sharers in any sub-division, for under the partition Gadadhar alone is entitled to the three entire villages and Harihar Bakhsh is entitled to the remaining pattis in the villages Himmatnagar and Kathwa It is said with truth that since the partition the position of Ganesh and Gadadhar has been analogous to that of the co sharers of an ordinary proprietary mahal which has been the subject of an imperfect partition under the Revenue Act But it seems to me that the analogy of an imperfect partition does not help the plaintiff so far as the claim under the first clause of section 9 is concerned, for, when upon a partition of an ordinary proprietary mahal each of several pattis is assigned to a different co-sharer and some land is left joint and all the co sharers remain jointly liable for the revenue, each patti becomes a sub division of the tenure, but the holder of one patti has never been regarded as a co sharer in a patti assigned to another person The holders of the different pattis can in such a case only claim pre emption against each other as co sharers of the whole mahal under the second clause of the section I think, therefore, that the plaintiff cannot claim pre emption under the first clause of the section

"The question whether the plaintiff can claim to pre empt under the second clause of the section is one of greater difficulty. The word mahal is not defined in

the purchaser would be jointly liable with him for the rent of all the villages allotted to Uman Prasad. Nor has it been suggested that a single record of rights has been prepared for all these villages. On the other hand, we know that each village has been separately assessed to revenue a fact which points to each village being a separate mahal It has no doubt been decided between the taluqdar on the one hand and Ganesh and Galadhar on the other that the latter are under existing circumstances jointly liable for the rent payable by them (see the judgements of 1896, 1898 and 1899, copies of which are on the record) but the question whether the joint liability related to each village separately or to all the villages taken together does not seem to have been raised Indeed the suits in which the joint liability was affirmed embraced not only the villages allotted to Uman Prasad, but also those allotted to Bisheshar Bakhsh, and it is absurd to suppose that the Court regarded both sets of villages as constituting one mahal. It is mere accident that both sets of villages have come into the same hands It was probably more convenient for the taluqdar to bring one suit in respect of all the villages than a separate suit in respect of each village, and the defendants rather benefited than otherwise by such a course.

"When the settlement officer fixed the rent at the recent settlement, under section 40 of the Revenue Act, he must have proceeded village by village, and unless the contrary appears it must be held that the liability for the rent of each mahal is distinct, that is to say, that Ganesh and Galadhar, though jointly liable, were under a separate liability for the rent of each village

"In my opinion the villages allotted to Uman Prasad did not constitute together one under proprietary mahal, nor do I think that section 100 of the Revenue Act of 1876, refers to such a mahal. It appears to me to refer to inferior mahals, each of which has been separately assessed to revenue I am also inclined to doubt whether the word mahal in section 9 of the Oudh Laws Act was ever intended to refer to such a collection of inferior mahals as we have in the present case. The words 'the cases referred to in section 40 of the Oudh Land Revenue Act' in section 7 of the Oudh Laws Act read with the section referred to seem to contemplate mahals properly so called, namely, areas separately assessed to revenue which would be dealt with separately by the settlement officer when fixing rents Be that as it may, I hold that the villages now held by the plaintiff and the villages in suit are not parts of the same mahal. I would, therefore allow the appeal, and dismiss the suit as regards the three entire villages and as regards the pattis I would call upon the parties to draw lots The court below found that Rs 19 950 4 3 was the proportionate price of the two pattis and as this has not been shown to be erroneous I would fix the price of the pattis at that figure"

The Judges having differed in opinion on a point of law the appeal was referred, under section 575 of the Civil Procedure Code (1882) to MR. L. G. EVANS (First Additional Judicial Commissioner) for decision. The material portion of his judgement was as follows:—

"The difficulty which arises in this case is that there is no definition of what is called an 'under-proprietary mahal.' A mahal, as pointed out by Mr. Chamier,

# DISTRICT

# GAZETTEERS.

## UNITED PROVINCES.

---

*The undermentioned Gazetteers of Districts in the United Provinces ha[ve] recently been published by the Government Press, and are available for sale [to] the public at the Government Book Depot, Allahabad. The prices quoted includ[e] packing and postage charges :—*

| District | Rs. | a. | p. | District | Rs. | a. | p. |
|---|---|---|---|---|---|---|---|
| Bulandshahr .. | 3 | 6 | 0 | Partabgarh . | 2 | 14 | 0 |
| Bahraich . | 2 | 14 | 0 | Fyzabad . | 3 | 6 | 0 |
| Sultanpur .. | 2 | 14 | 0 | Gonda | 3 | 6 | 0 |
| Unao .. | 3 | 6 | 0 | Agra | 3 | 6 | 0 |
| Hardoi .. | 3 | 6 | 0 | Fatehpur .. | 3 | 6 | 0 |
| Bara Banki | 3 | 6 | 0 | Basti . | 3 | 6 | 0 |
| Sitapur | 2 | 14 | 0 | Budaun .. | 3 | 6 | 0 |
| Kheri . | 2 | 14 | 0 | Bijnor ... | 3 | 6 | 0 |
| Meerut | 3 | 6 | 0 | Jaunpur . .. | 4 | 6 | 0 |
| Lucknow | 3 | 6 | 0 | Benares | 4 | 6 | 0 |
| Ballia | 3 | 6 | 0 | Ghazipur . | 3 | 6 | 0 |
| Muzaffarnagar | 3 | 6 | 0 | Pilibhit .. | 2 | 14 | 0 |
| Naini Tal | 3 | 6 | 0 | Banda . | 3 | 6 | 0 |
| Rae Bareli . | 2 | 14 | 0 | Saharanpur | 3 | 6 | 0 |

*Apply to the SUPERINTENDENT,*

*Government Press, Allahabad.*

As I find that the plaintiff Ganesh Bakhsh is not a co-sharer in the mahal in which the entire villages sold are situated, it follows that he cannot be a co-sharer in the tenure in which these villages are comprised, because the word 'tenure' must be intended to mean a sub-division of such mahal, though no definition of the word 'tenure' is given anywhere in the Act.

The point for decision in this case is one of much difficulty, as no similar case appears ever to have arisen. For the reasons given above I would allow the appeal with respect to the three entire villages and as regards the pattis call upon the parties to draw lots, the proportionate price being fixed at Rs. 10,950-1-6."

In the result the appeal was allowed with respect to the three entire villages (MR. EVANS agreeing with MR. CHAMIER) and subsequently lots having been drawn the right to purchase the two pattis fell to Harihar Bakhsh Singh and the appeal was allowed with regard to them also, and the suit dismissed as to the whole of the property in suit.

On this appeal—

*Sir R. Finlay K. C.* and *Ross* for the appellant contended that the appellant was entitled to the right he claimed of pre-emption in respect of all the properties in suit, basing their arguments mainly on the construction of the Oudh Laws Act, (XVIII of 1876) and the Oudh Land Revenue Act (XVII of 1876) and the reasons for their decisions given by the Subordinate Judge, and the Additional Judicial Commissioner, Mr. Wells. That Ganesh Bakhsh Singh and Gadadhar Bakhsh Singh were jointly liable for the rent of the properties had been admitted in a case which came on appeal to the Privy Council [see *Ganesh Bakhsh* v. *Harihar Bakhsh* (1)]. The majority of the Judges of the appellate court had misunderstood the nature and effect of the joint liability of the under-proprietor to the superior proprietor, and had misconstrued the provisions of the Acts. That court had erred also in holding that the appellant and Harihar Bakhsh Singh had an equal right of pre-emption in respect of the two pattis. Reference was made to the Oudh Land Revenue Act (XVII of 1876), sections 40, 68, 100, and 101; Oudh Laws Act (XVIII of 1876), chapter II, part 3, sections 6, 7, 8 and 9, clause (3); Oudh Land Revenue Act (III of 1901), section 4, sub-section 4, the definition of "mahal," sub section 14, and section 138; and Thomason's Directions to Revenue officers, pages 49, 50, 51, paragraphs 82 to 89.

(1) (1904) I. L. R., 26 All., 299.

The Bombay Code, Vol I, Third Edition 1907 ... Rs 4 (8 a)
Ditto Vol II, Third Edition 1907 .. Rs 6 (8 a)
Ditto Vol III, Third Edition, 1908 .. Rs 5 (8 a)
Ditto Vol IV, Third Edition 1909 .. Rs 4 (8 a)
Volumes I to IV Reduced to Rs 11 per set
The Coorg Code Third Edition 1908 ... Rs 2 (4 a)
E B & Assam Code Vol I, Edition 1907 .. Rs 6 (10 a)
Ditto Vol II, Edition 1907 Rs 6 (10 a)
Ditto Vol III, Edition 1907 Rs 6 (10 a)
Volumes I to III reduced to Rs 16 per set
The United Provinces Code, Vol I, Fourth Edition 1903 consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table Rs 5 (8 a)
The United Provinces Code, Vol II, Fourth Edition 1906 consisting of the Acts of the Lieutenant Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in or extended to the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874 with an Index Rs 10 (Re 1) for both Vols or Rs 6 (8a) for each Volume
The United Provinces Code Vols I and II reduced to Rs 7 per set

*In the Press*

A new edition of the Burma Code

## II—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION

| | |
|---|---|
| Act I of 1846 (Legal Practitioners) as modified up to 1st October 1907 | 2 a (1 a) |
| Act XXI of 1850 (Removal of Caste Disabilities) with foot notes | 1 a 6 p (1 a) |
| Act XXXVII of 1850 (Public Servants Inquiries) as modified up to 1st August 1908 | 11 a (1 a) |
| Act XXX of 1852 (Naturalization of Aliens) as modified up to 30th April 1908 | 2 a (1 a) |
| Act XX of 1853 (Legal Practitioners) as modified up to 1st September 1907 | 1 a 9 p (1 a) |
| Act XXIV of 1854 (Malabar War—Knives) with foot notes | 1 a 3 p (1 a) |
| Act XXIII of 1855 (Administration of mortgaged Estates), as modified up to 1st October, 1908 | 1 a 3 p (1 a) |
| Act XXIV of 1855 (Penal Servitude) as modified up to 1st January 1909 | 2 a (1 a) |
| Act XIII of 1857 (Opium), as modified up to 1st August, 1908 | 4 a 3 p (1 a) |
| Act XXVII of 1857 (Madras University), with foot notes | 2 a 9 p (1 a) |
| Act IX of 1859 (Forfeiture) as modified up to 1st October 1908 | 1 a 9 p (1 a) |
| Act XXIV of 1859 (Madras District Police) as modified up to 1st November, 1907 | 3 a 6 p (2 a) |
| Act XVI of 1863 (Excise Duty on Spirits), as modified up to 1st October 1908 | 2 a (1 a) |
| Act XXXI of 1863 (Gazette of India) with footnotes | 1 a 3 p (1 a) |
| Act XV of 1864 (Indian Tolls) as modified up to 30th June 1909 | 1 a 9 p (1 a) |
| Act X of 1865 (Succession) as modified up to 1st April 1909 | 1 s 1 8 (2 a) |
| Act XXII of 1867 (Serais and Paraos) as modified up to 1st August 1908 | 2 a (1 a) |
| Act XXV of 1867 (Press and Registration of Books) as modified up to 1st October 1907 | 5 a (1 a) |

and Ganga Bakhsh Ganga Bakhsh had obtained a sanad of taluqa Saraura, but in 1864 on the occasion of the regular settlement a compromise was made between Ganga Bakhsh, Bisheshar Bakhsh and Uman Prasad, by which one half of the taluqa was assigned to Ganga Bakhsh as superior proprietor and the other half to Bisheshar Bakhsh and Uman Prasad in equal shares in under proprietary right, they paying the Government revenue plus malikana at the rate of 10 per cent to the taluqdar, and being jointly liable to him in respect of the same as rent Bisheshar Bakhsh died childless and his share devolved on Uman Prasad Uman Prasad died, and his property devolved upon Gadadhar, his grand-son, and Ganesh Bakhsh, his son In 1893 a partition was made between Gadadhar and Ganesh Bakhsh under which the property in question in this suit was assigned to Gadadhar A decree was made in accordance with the partition, and mutation of names was effected accordingly, but no separate engagement was made for payment of the Government revenue in respect of three entire villages or the two pattis assigned to Gadadhar.

On the 13th of September, 1902, Gadadhar sold the property in question to Harihar Bakhsh, who had succeeded his father Ganga Bakhsh as taluqdar of Saraura

Thereupon Ganesh Bakhsh filed this suit against Harihar, who is respondent No. 1, and Gadadhar, who is dead, and is now represented by his widow, respondent No 2 The claim was for pre emption in respect of the three villages and the two pattis

The Subordinate Judge of Sitapur decided in favour of the plaintiff, Ganesh Bakhsh From that decision Harihar appealed to the Court of the Judicial Commissioner The appeal was heard in the first instance by Mr Wells, Additional Judicial Commissioner, and Mr Chamier, Officiating Judicial Commissioner The learned Judges differed in opinion, and so the appeal was referred to Mr Evans, First Additional Judicial Commissioner Mr Evans agreed with Mr Chamier in thinking that the suit ought to be dismissed as regards the three entire villages, and that as regards the two pattis Ganesh Bakhsh and Harihar, as the only other members of the village communities

Act XVI of 1893 (Northern India Canal and Drainage) with foot-notes, 1 *a* (1 *a*)
Act X of 1904 (Co-operative Credit Societies) with reference to rules under the Act ... ... .. ... 5 *a* 6 *p* (1 *a*)
Regulation III of 1818 (Bengal State Prisoners Regulation), as modified up to 1st August, 1909 ... . ... ... 2 *a* 9 *p* (1 *a*)
Regulation I of 1890 (British Baluchistan Laws Regulation), as modified up to 1st June, 1909 ... .. ... ... 6 *p* (1 *a*)

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN AS ORIGINALLY PASSED

Acts (Unrepealed) of the Governor General of India in Council from 1907 up to date.
Regulations made under the Statute 33 Vict., Cap 3, from 1907 up to date
The above may be obtained separately The price is noted on each.]

## IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR INDIA IN COUNCIL

| | | |
|---|---|---|
| Act XXI of 1850 (Caste Disabilities), with foot notes ... | In Urdu. | 3 *p* (1 *a*) |
| Ditto ditto ... | In Hindi. | 3 *p* (1 *a*) |
| Act XXXVII of 1850 (Public Servants Inquiries), as modified up to 1st August, 1908 ... ... ... ... ... | In Urdu. | 9 *p* (1 *a*) |
| Ditto ditto .. | In Nagri. | 9 *p* (1 *a*) |
| Act XIII of 1857 (Opium), as modified up to 1st August, 1908 .. | In Urdu | 9 *p* (1 *a*) |
| Ditto ditto ... | In Nagri | 9 *p* (1 *a*) |
| Act IX of 1859 (Forfeiture), as modified up to 1st October, 1908 . | In Urdu. | 3 *p* (1 *a*) |
| Ditto ditto ... | In Nagri. | 3 *p*. (1 *a*) |
| Act XVI of 1863 (Excise), as modified up to 1st October, 1908 ... | In Urdu. | 3 *p* (1 *a*) |
| Ditto ditto . | In Nagri. | 3 *p* (1 *a*) |
| Act XXXI of 1863 (Official Gazette) with footnotes ... ... | In Urdu | 3 *p* (1 *a*) |
| Ditto ditto ... | In Nagri. | 3 *p*. (1 *a*) |
| Act XV of 1864 (Indian Tolls), as modified up to 30th June, 1909 . | In Urdu | 3 *p*. (1 *a*) |
| Ditto ditto . | In Nagri. | 3 *p* (1 *a*) |
| Act X of 1865 (Succession), as modified up to 1st April, 1909 .. | In Urdu | 11 *a* 3 *p*. (2 *a* |
| Ditto ditto ... | In Nagri | 11 *a* 3 *p* (2 |
| Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August, 1908 ... .. ... . ... ... | In Urdu. | 6 *p* (1 *a*) |
| Ditto ditto ... | In Nagri. | 6 *p*. (1 *a*) |
| Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907 . ... . .. | In Urdu | 1 *a* 3 *p* (1 *a*) |
| Ditto ditto .. | In Nagri | 1 *a* 3 *p* (1 *a*) |
| Act V of 1870 (Unclaimed Deposits), as modified up to 1st October, 1908 ... ... | In Nagri | 3 *p* (1 *a*) |
| Act VII of 1870 (Court fees), as modified up to 1st February, 1909 .. | In Urdu | 5 *a*. 9 *p*. (1 *a*) |
| Ditto ditto ... | In Nagri | 5 *a* 6 *p* (1 *a*) |
| Act XXVII of 1871 (Criminal Tribes) as modified up to 1st September, 1908 . .. . .. ... | In Urdu | 1 *a* 3 *p* (1 *a*) |
| Ditto ditto ... | In Nagri. | 1 *a* 3 *p* (1 *a*) |
| Act I of 1872 (Evidence) as modified up to 1st May, 1908 ... ... | In Urdu | 8 *a*. (2 *a*) |
| Ditto ditto ... | In Nagri. | 8 *a*. (2 *a*) |
| Act I of 1878 (Opium) as modified up to 1st October, 1907 ... | In Urdu | 1 *a*. 6 *p*. (1 *a*) |
| Ditto ditto .. | In Nagri | 1 *a*. 6 *p* (1 *a*) |
| Act XII of 1880 (Kazis) with footnotes ... ... ... | In Urdu. | 3 *p*. (1 *a*) |
| Act II of 1882 (Trusts), as modified up to 1st June, 1909 ... ... | In Nagri. | 3 *a*. 6 *p*. (1 *a*) |
| Act XIII of 1889 (Cantonments), as modified up to 1st October, 1907 .. .. . . . | In Urdu | 3 *a* (1 *a* 6 *p*) |

more mauzas or parts of mauzas or only a portion of one mauza It is clear that the villages assigned to Uman Prasad did not form a separate mahal in the ordinary sense. The kabuliat of the taluqa in which they are included a copy of which is on the record shows that each village in the taluqa was separately assessed to revenue, and that the taluqdar entered into one engagement for the payment of the revenue on all the villages The whole taluqa is therefore, what is called in the Act, a taluqdari mahal consisting of a large number of villages each of which is separately assessed to revenue and may be regarded as an infer or mahal (see sect on 100 (a) of the Revenue Act of 1876) The plaintiff is certainly not a co-sharer in the taluqdari mahal for the taluqdar has no co-sharer Nor as I have already pointed out is the plaintiff a co-sharer in any of the infer or mahals just referred to of which the taluqa is made up "

Their Lordships think that the meaning which Mr. Chamier has attributed to the term 'mahal' is the proper meaning of the word in the Oudh Laws Act 1876, and that although Gadadhar and Ganesh may have been jointly liable to the taluqdar for the Government revenue plus malikana, as the rent of villages and pattis assigned to Bisheshar and Uman under the compromise of 1864, Gadadhar and Ganesh were not at the date of the sale to Harihar co sharers in any subdivision of the tenure in which the property in question was comprised or in the whole mahal

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed

The appellant will pay the costs of the appeal

*Appeal dismissed*

Solicitors for the appellant *Barrow, Rogers and Nevill*

Solicitors for the first respondent *T L Wilson and Co*

J V W

---

ANANT SINGH (PLAINTIFF) v DURGA SINGH (DEFENDANT)

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow ]

*Hindu law—Custom—Family custom in derogation of the ordinary Mitakshara law governing the parties—Proof of custom—Wajib ul ar es—Entries in case in which there was no instance of custom ever having been observed — Entries showing contradictory views and wishes of individuals rather than fact of existence of a custom*

In a family of Ahban Thakurs in Oudh the respondent took possession on the death of his full brother of a share of an estate called Deokalia The appellant step brother of the respondent and of the deceased sued for a moiety of the share of the estate which had belonged to the deceased on the ground that

---

*Present* Lord MACNAGHTEN Lord COLLINS Sir ARTHUR WILSON and Mr AMEER ALI

and was the son of another first cousin then deceased. Mannu Singh died in 1874, and on his death and after the death of his widow who succeeded him litigation took place, in the course of which attempts were made to interfere with the course of the ordinary Mitakshara law in the family, but they were unsuccessful, and under that law a one fourth share of the Deokalia estate became vested in Ratan Singh, which on his death in 1899 was held by his widow Mana Kunwar until her death in April, 1903 Thereupon Durga Singh claimed to be brought on the register as his sole heir This claim was opposed by Anant Singh on the ground of the custom set up as above stated, but mutation of names was eventually effected in favour of Durga Singh, and Anant Singh on 30th January, 1906 instituted the suit out of which this appeal arose

The documentary evidence for the plaintiff included twenty wajib ul arzes which had been prepared with others in 1870-1872 and had been put forward in the litigation which took place after the deaths of Mannu Singh and his widow as stated above, and the documentary evidence for the defendant comprised (among others) the wajib ul arz of the village of Deokalia the parent village of the estate The plaintiff called 13 witnesses in support of the alleged custom, and the defendant to rebut their evidence produced with a petition, dated *10th July 1906*, copies of certain wajib ul-arzes of villages of the families to which some of these witnesses belonged. Those documents stated that a real brother was preferred to a half brother The defendant himself and four other Ahban Thakurs gave evidence for the defence.

The Subordinate Judge disbelieved the evidence with regard *to one alleged instance of the custom*, but he *considered that* three of the plaintiff's witnesses, the 9th Drigbijai Singh, the 10th Chandrika Bakhsh Singh and 11th Sital Prasad taken together with the wajib ul arzes were sufficient to establish the plaintiff's case

As to the defendant's evidence he said

The defendant's first witness is defendant himself He is the most interested man and his statement can have hardly any weight Four more witnesses were examined on behalf of the defendant They are Ahban Thakurs but not members of the same family as the parties Hence their testimony that the

## V MISCELLANEOUS PUBLICATIONS

Table showing Effect of Legislation in the Governor General's Council during 1906 ... 3a 6p (1a)

Ditto ditto during 1907 2a 6p (1a)

Ditto ditto during 1908 4a (1a)

Ditto ditto during 1909 3a 3p (1a)

Annual Indexes to the Acts of the Governor General of India in Council for 1906, 1907, 1908 and 1909 The price is noted on them

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date Super royal 4to Annual subscription Rs 5 (Re 1) single issue 4a including postage

List of General Rules and Orders under Statutes and General Acts in force in British India Corrected up to 31st December, 1908 Rs 1 4 0 (3a)

Addenda and Corrigenda List No I of 1909 to the List of General Rules and Orders 3p (1a)

Ditto ditto No II of 1909 7a 6p (1a)

Chronological Tables of the Indian Statutes compiled under the orders of the Government of India by F G Wigley, of the Inner Temple Barrister at Law Edition 1909 Rs 4 (8a)

A Digest of Indian Law Cases, containing the High Court Reports and Privy Council Reports of Appeals from India 1901-03, with an Index of cases compiled under the orders of the Government of India by F G Wigley of the Inner Temple, Bar at Law Edition 1906 Rs 10 Reduced to Rs 3 per copy (10a)

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India 1904 with an Index of cases compiled under the orders of the Government of India, by C F Grey Bar-at-Law Edition 1907 Re 1 4a Reduced to Re 1 per copy (6a)

Ditto ditto 1905 by C E Grey Bar at Law Edition 1907 Re 1 4 Reduced to Re 1 per copy (6a)

Ditto ditto 1906 by C E Grey Bar-at Law Edition 1908 Re 1 4 Reduced to Re 1 per copy (6a)

Ditto ditto 1907 by B D Bose, Bar at Law, Edition 1908 Re 1 4 Reduced to Re 1 per copy (5a)

Ditto ditto 1908 by C E Grey Bar at Law, Edition 1910 Rs 2 (6a)

Set of Digests from 1901—1907 Reduced to Rs 7 per set of 5 volumes) (Rs 2)

General Rules and Orders made under enactments in force in British India consisting of General Rules Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index. In three Volumes Rs 15 Reduced to Rs 10 per set (Rs 2) or Rs. 5 per Volume (12a)

Volume IV in the Press

Title page and Contents of the Acts passed by the Governor General of India in Council in the year 1907 1a 6p (1a)

Ditto ditto 1908 6a 9p (1a)

Ditto ditto 1909 3a 3p (1a)

of the late Ratan Singh he, reference is made to clause 4 of these three wajib-ul-arzes In the wajib-ul arz of the remaining village Deokalia, which gives its name to the estate of Ratan Singh the custom is not set forth, but it is said that the heir at law '*waris jaiz*' takes the property of the deceased brother The alleged custom is the subject of a ruling in *Chandika Bakhsh* v *Muna Kunwar*(1), wherein the parties relying on it said that it is prevalent amongst the Ahban Thakurs who migrated from Gujrat to Oudh several centuries ago Several well known rulings lay down that a custom as used in the sense of a rule which in a particular district, clan, or family has from long usage obtained the force of law must be ancient, continued, unaltered, uninterrupted uniform, constant peaceable, and acquiesced in, reasonable, certain and definite, compulsory and not optional to every person to follow or not. These being the requisites of a custom it follows that it must be established by clear and unambiguous evidence The evidence on which the plaintiff relies consists of the 20 wajib-ul-arzes already mentioned, and the oral testimony of two witnesses In the lower court he examined some ten witnesses of the Ahban caste, all professing to be members of the family to which he belongs, but when questioned about their relationship all but two of them were unable to explain it. These two witnesses are Drigbijai Singh 50 years of age, and Chandika Bakhsh Singh, 30 years of age at the time of their examination All that the first could say was that Ranjit Singh and Balwant Singh had had the custom recorded in the wajib ul arz in his presence 36 years before He must, then, have been 14 years old at the time In cross examination he said that it was the mukhtars of these two persons who had caused the custom to be recorded. Chandika Bakhsh's statement is equally uncertain It is that his father was his informant of the custom when he was 10 years of age Such help is no help to the plaintiff

"The learned pleader for the plaintiff insists that because no rebutting evidence has been produced, the entries regarding the custom on which he bases his claim should be accepted as sufficient evidence of the custom, its antiquity, *certainty* and *immutability* He refers to the remark made by Mr Spankie, late Additional Judicial Commissioner of Oudh, in *Pragi* v. *Baiju* (2) namely, that it is a question of fact whether a wajib ul arz is or not sufficient proof of a question With this remark I quite agree and I am deciding the question accordingly But in that ruling Mr Spankie also held that a single wajib ul-arz, even if not rebutted or not shown to have been irregularly prepared, is not necessarily sufficient proof of a custom and what the learned pleader wants is that the entries in the wajib ul arz in suit should be held to be necessarily sufficient proof of the custom on which the plaintiff's claim is based because they are unrebutted In the absence of any authority for this proposition I am not prepared to hold so

"The wajib ul arzes are no doubt correct, that is the entries regarding the *haq* or *rasum wirasat* were made from inquiries on the Settlement Officer's part from the four surviving members of the family and are duly attested and signed. But when after a lapse of more than 30 years, from their preparation the plaintiff

(1) (1902) I. L R, 24 All, L. R, 29 I. A, 70

(2) (1901) 4 Oudh Cases, 71.

that the question whether a particular wajib ul arz is sufficient proof of a custom recorded therein is a matter, not of law, but of fact. There is of course a presumption of law in favour of the correctness of the entries in such a document, but, in the present instance it is not seriously denied that the entries were made by the proper official in accordance with the requisite procedure and the only question is whether the entries constituted according to their contents, really do embody a record of custom actually prevailing in this family or are expressions of the wishes of particular members of the family on customs which they would like to prevail."

After referring to other rulings which lay down the general principles applicable to the evidence required in support of a family custom derogating from the ordinary law, the judgement continued :—

"It appears to me that we are entitled to expect very clear and unambiguous evidence before we accept as established the existence of a family custom which not merely is opposed to the ordinary law but is admittedly evidenced by no documents other than the wajib ul arzes and has never, in fact, to the knowledge of the parties or their witnesses, been followed in any instance of the devolution of property "

After criticising the wajib ul-arzes produced and the many inconsistencies they contained, the judgement proceeded :—

"Before I leave the subject of the wajib ul arzes, I should like to direct attention, with regard to that relating to Deokalia (Exhibit A 4), to a circumstance which, in my opinion seems to cast the gravest doubt on the existence of this custom The wajib ul arz is of importance because it relates to the parent village, and it may be noticed that this was the last village of which the wajib-ul-arz was attested In this document there is no mention of the custom asserted by the plaintiff, and, where it would have operated, it is declared that the heir at law is entitled to succeed The learned pleader for the plaintiff has admitted that this wajib ul arz does not support his case, but contents himself with the argument which appears to me very inconclusive, that its contents are 'not inconsistent' with the existence of the custom "

In commenting on the oral evidence the judgement remarked as to that of Drigbijai and Chandika Bakhsh as follows:—

"The next testimony upon which the lower court appears to have placed some reliance is that of Drigbijai (P W 9), who gives as his authorities two other members of the family, Balwant and Ranjit, who according to his story, caused this custom to be recorded in his presence some 37 years before In point of fact, there is no wajib ul arz in which Balwant and Ranjit personally caused entries to be recorded and in which there is a mention of any such custom The witness was compelled to shift his ground by attempting to explain away the difference by professing to have heard of the custom from Balwant and Ranjit when he was ten or fourteen years of age The last witness Chandrika Bakhsh (P W 10) gives his age as forty and professes to have derived his information from his father, Mahipat, twenty years ago Mahipat did not personally dictate

*Ali Khan* v *Husain Khan* (1), *Hub Ali* v *Wazir un nissa* (2); *Pirbati Kunwar* v *Chandarpal Kunwar* (3), *Nandi Singh* v *Sita Ram* (4), *Sarwari Begam* v *Khatim un nissa* (5), *Ali Nasir Khan* v *Manik Chand* (6), *Uman Parshad* v *Gandharp Singh* (7) and the Oudh Land Revenue Act (XVII of 1876) sections 3 and 17

*DeGruyther, K C*, and *Kenworthy Brown* contended that the wajib ul arzes did not prove the existence of the custom set up; nor was the oral evidence adduced by the appellant reliable evidence of the existence of any such custom The onus was on the appellant to prove the custom, and the requisites for proof of a custom were set out in Mayne's Hindu law, 7th ed pages 57, 58, but none of those essentials was to be found here There was no instance of the alleged custom ever governing the inheritance of persons in the family What happened in this case was that in 1870 72 wajib ul arzes were prepared with reference to various villages on the Deokalia estate, and in several of these documents statements inconsistent with the ordinary Hindu law were recorded on information supplied by some of the owners or their agents with regard to the right of inheritance There was a want of consistency between certain of these statements, and in some instances the rules governing the devolution of property in the different branches of the family were not the same Some of these wajib ul arzes were produced as evidence in a case which eventually came on appeal to the Privy Council—*Chandika Bakhsh* v *Muna Kunwar* (8)—and were held to be insufficient to prove the custom then set up It was submitted that parties could not by arrangement make evidence of a custom by getting it entered in a wajib ul arz A proprietor of an estate could in that way have anything he pleased entered in a wajib ul-arz, and that was what appeared to have taken place in this case The evidence of Sital Prasad, appellant's witness No 11 said —" I recorded the wajib ul arz of Deokalia according to the instructions

(1) (1898) I L R 26 Calc 81 (92) L R 25 I A 161 (163)
(2) (1903) I L R 28 All 496 (506) L R 33 I A 107 (116)
(3) (1909) I L R 31 All 457 (475) L R 36 I A 125 (131)
(4) (1888) I L R 16 Calc 677 (681) L R, 16 I, A, 44 (46)
(5) (1908) 11 Oudh Cases 111 (112)
(6) (1902) I L R 25 All. 90 (93 96)
(7) (1887) I L R 15 Calc 20 (28 29) L R, 14 I A 127 (134)
(8) (1901) I L R 24 All 273 L R, 29 I A, 70

the plaintiff as sufficient to establish such a special custom in the family as to rebut the ordinary presumption that the Mitakshara Law prevailed. It has been pointed out more than once at this Board that there is no class of evidence that is more likely to vary in value according to circumstances than that of the wajib-ul-arzes—*Muhammad Imam Ali Khan* v. *Husain Khan* (1) and *Parbati Kunwar* v. *Chandrapal Kunwar* (2)—and where, as here, from internal evidence, it seems probable that the entries recorded connote the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well established custom, the learned Judicial Commissioners properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed. The question involved was one of fact only, and Their Lordships see no reason whatever to differ from the opinion of the learned Judicial Commissioners.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

*Appeal dismissed.*

Solicitors for the appellant: *Barrow, Rogers and Nevill.*

Solicitors for the respondent: *T. L. Wilson, & Co.*

J. V. W.

## APPELLATE CIVIL.

*Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.*

KARANPAL SINGH (PLAINTIFF) v. BHIMA MAL AND ANOTHER (DEFENDANTS).*

*Act (Local) No. II of* 1901 *(Agra Tenancy Act), sections* 176 *and* 177—*Civil Procedure Code* (1882), *sections* 2 *and* 102—*Dismissal of suit for default—Order—Decree—Appeal.*

An order of a Rent Court dismissing a suit for default of appearance by the plaintiff does not amount to a decree, and consequently such order when passed by an Assistant Collector of the first class is not appealable. *Zohra* v. *Mangu Lal* (3) followed.

* Second Appeal No. 1090 of 1908 from a decree of Ahmad Ali, Additional Judge of Aligarh, dated the 29th of August 1908, confirming a decree of Ram Prasad, Assistant Collector, first class, of Bulandshahr, dated the 23rd October 1907.

(1) (1898) I. L. R., 26 Calc., 81 (92); L. R., 25 I. A., 161 (169).
(2) (1909) I. L. R., 31 All., 457; L. R., 36 I. A., 125 (131).
(3) (1906) I. L. R., 28 All., 753.

The case then came up for hearing before KNOX and KARAMAT HUSAIN, JJ.

Babu *Piary Lal Banerji*, for the appellant, submitted that the case relied upon by the District Judge had no application, because the Full Bench in that case had only held that orders passed in execution by a Rent Court had not the force of decrees. Under the Code of Civil Procedure orders passed in execution are by a special clause declared to have the effect of a decree. All that the Full Bench, in the case noted, ruled was that the additional enabling clauses in the definition of a decree in section 2 of the Code of Civil Procedure could not be invoked in aid to give to such orders, when passed by Rent Courts, the force of decrees. Similarly, an order rejecting a plaint, but for the special clause in the Code of Civil Procedure would not be a decree. Therefore, an order rejecting a plaint when passed by a Rent Court would not be a decree, because those special clauses in the definition of a decree were not applicable to the Rent Act. This was held in *Maulvi Muhammad Abdul Jalil* v. *Maulvi Muhammad Abdul Aziz* (1). He also discussed *Zohra* v. *Mangu Lal* (2). In this case the suit was dismissed for default, and the Rent Court itself framed a decree, embodying the "formal expression of its adjudication." This was appealable not by reason of any special enabling clause in the Code of Civil Procedure, but because the pronouncement of the court was a "decree," independent of any enabling clause in the Code of Civil Procedure. The suit was dismissed, the reason for the dismissal being the non-production of any evidence by the plaintiff, and the dismissal was a decree.

He also cited *Ablakh* v. *Bhagirathi* (3) and *Gosto Behary Sardar* v. *Hari Mohan Adak* (4). Moreover, under section 102 of the Code of Civil Procedure, if the defendant admitted a part of the claim, the Court would have to pass a decree for that amount and dismiss the claim as to the remainder. It could not be contended that a portion of the order had the force of a decree and a portion not. The incongruity of breaking up a decree into two parts was considerable.

As to the case of *Mansab Ali* v. *Nihal Chand* (5) the point that was actually decided was that an "appeal dismissed for default

(1) S. A. No. 309 of 1909 decided on 8th February 1910.
(2) (1906) I. L. R., 28 All., 753.
(3) (1887) I. L. R., 9 All., 427.
(4) (1903) 8 C. W. N., 318.
(5) (1893) I. L. R., 15 All., 359.

The case then came up for hearing before KNOX and KARAMAT HUSAIN, JJ.

Babu *Peary Lal Banerji*, for the appellant, submitted that the case relied upon by the District Judge had no application, because the Full Bench in that case had only held that orders passed in execution by a Rent Court had not the force of decrees. Under the Code of Civil Procedure orders passed in execution are by a special clause declared to have the effect of a decree. All that the Full Bench, in the case noted, ruled was that the additional enabling clauses in the definition of a decree in section 2 of the Code of Civil Procedure could not be invoked in aid to give to such orders, when passed by Rent Courts, the force of decrees. Similarly, an order rejecting a plaint, but for the special clause in the Code of Civil Procedure would not be a decree Therefore, an order rejecting a plaint when passed by a Rent Court would not be a decree, because those special clauses in the definition of a decree were not applicable to the Rent Act. This was held in *Maulvi Muhammad Abdul Jalil* v *Maulvi Muhammad Abdul Aziz* (1). He also discussed *Zohra* v. *Mangu Lal* (2). In this case the suit was dismissed for default, and the Rent Court itself framed a decree, embodying the "formal expression of its adjudication." This was appealable not by reason of any special enabling clause in the Code of Civil Procedure, but because the pronouncement of the court was a "decree," independent of any enabling clause in the Code of Civil Procedure. The suit was dismissed, the reason for the dismissal being the non-production of any evidence by the plaintiff, and the dismissal was a decree.

He also cited *Ablakh* v. *Bhagirathi* (3) and *Gosto Behary Sardar* v. *Hari Mohan Adak* (4). Moreover, under section 102 of the Code of Civil Procedure, if the defendant admitted a part of the claim, the Court would have to pass a decree for that amount and dismiss the claim as to the remainder. It could not be contended that a portion of the order had the force of a decree and a portion not. The incongruity of breaking up a decree into two parts was considerable.

As to the case of *Mansab Ali* v. *Nihal Chand* (5) the point that was actually decided was that an "appeal dismissed for default

(1) S A No 309 of 1909 decided on 8th February, 1910
(2) (1906) I L R, 28 All, 753
(3) (1887) I L R, 9 All, 427.
(4) (1903) 8 C W N, 313
(5) (1893) I L R, 15 All, 359

to enact that certain orders would have the effect of, and would be liable to the various provisions relating to decrees, there would have been no difficulty in placing the word ' order ' in the interpretation clause and defining it, more or less in the same way that it was defined in the Code of Civil Procedure, 1882 We must, therefore, take it that the word ' order ' when it occurs in the Act, confers only those privileges on the holder of the ' order ' and is subject to only those limitations, which in that Act are expressly said to attach to an ' order ' Moreover, there is no right of appeal from either a ' decree ' or an ' order ' unless the Statute gives it The Tenancy Act starts with a section in which it clearly lays down that " no appeal shall lie from any decree or order passed by any court under this Act except as hereinafter provided " It then continues to deal with appeals, and it lays down *seriatim* where an appeal lies from a decree and from an order, where it lies from a decree only and where it lies from an order only There is no doubt that the Legislature did take the matter into consideration and put into separate classes ' decrees ' and ' orders ' This being so, we dismiss the appeal with costs

*Appeal dismissed*

---

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain*

GANESH SINGH (DECREE HOLDER) *v* DEBI SINGH (JUDGMENT DEBTOR) *

*Civil Procedure Code (1908) order XXXII rule 14—Usufructuary mortgage —Possession not given to mortgagee—Suit for possession compromised mortgagee taking simple money decree—Sale of mortgaged property*

A usufructuary mortgagee who had not obtained possession of the mortgaged property brought a suit for possession The suit was compromised and by consent a simple money decree was passed in favour of the mortgagee

*Held* that the decree being a decree passed on a compromise the mortgagee was not precluded from bringing the mortgaged property to sale in execution thereof

*Madho Prasad Singh* v *Baij Nath* (1) *Hem Ban* v *Bihari Gir* (2) and *Narsingh Das* v *Munna* (3) distinguished *Rai Kashi Pershad Singh* v *Babu Duleep Narain Sahu* (4) followed

THE facts of this case were as follows —

The respondent, Debi Singh, executed a usufructuary mortgage in favour of Ganesh Singh Possession over the mortgaged

---

* Second Appeal No 530 of 1909 from a decree of Austin Kendall District Judge of Cawnpore dated the 4th of May 1909 confirming a decree of Mohan Lal Hakku Subordinate Judge Cawnpore dated the 13th of January 1909

(1) Weekly Notes 1905 p 152
(2) (1905) I L R, 28 All, 58
(3) (1909) 6 A L J 731
(4) (1901) 6 C W N 264

were entitled to set aside a sale made on 20th January 1897 of certain immovable property in execution of a decree passed on 14th November 1894 by the Court of the Subordinate Judge of Bara Banki in favour of the appellant Munnu Lal, against the respondents and the other sons of one Ghulam Hasrat, deceased Ghulam Hasrat was the owner of an ancestral share of a village called Kola Gahbari Kasim Ali and Makdum Bakhsh were the owners of another share in the same village, which share, on 22nd April 1875, they mortgaged with possession to one Jaisi Ram In execution of a decree for other sums of money obtained against them by Jaisi Ram the equity of redemption in their mortgage of 22nd April 1875 was sold and was purchased by one Tika Ram on 17th February 1880, and Tika Ram on 15th September 1880 sold the said equity of redemption to Jaisi Ram Ghulam Hasrat thereupon claimed the right to pre empt, and eventually a decree for pre-emption of the equity of redemption was made in his favour on 20th September 1881

Ghulam Hasrat died in May 1885 leaving as his heirs four sons Ghulam Dastgir, Ghulam Razzak, Ghulam Abbas and Ghulam Sarfaraz, who succeeded to his estate The three last named sons being minors, Ghulam Dastgir on 15th January 1886 applied to the District Court at Lucknow for a certificate of guardianship under Act XL of 1858, and on 13th March 1886 he was duly appointed guardian of the persons and property of his minor brothers

On 20th December 1889 Ghulam Dastgir, for himself and as guardian of Ghulam Abbas and Ghulam Sarfaraz and Ghulam Razzak who had then attained majority, executed a mortgage of both the ancestral share, and the share acquired by pre emption in favour of the present appellant Munnu Lal, who in 1892 brought a suit on the mortgage and on 14th November 1894, obtained a decree for sale In execution of that decree both shares were purchased by Munnu Lal and Janki Prasad, the second appellant subject to existing incumbrances, namely, the mortgage with possession of the 22nd April 1875 as to the acquired share, and a mortgage with possession of the ancestral share dated 26th April 1881 executed by Ghulam Hasrat in favour of one Sanwale Singh

Act or an order XXXIV, rule 14, of the Code of Civil Procedure was quite comprehensive and did not necessarily refer to the case of an existing mortgage He relied on *Madho Prasad Singh* v *Baij Nath* (1), *Hem Ban* v *Behari Gir* (2) and *Nar singh Das* v *Musammat Munni* (3)

Babu *Purushottam Das Tandan* in reply submitted that in none of the above cases was there a compromise decree in question and that for that reason they were distinguishable from the present case The case of *Rai Kashi Pershad* v *Duleep Narain* (4) was more in point

KNOX and KARAMAT HUSAIN, JJ —This second appeal arises out of execution proceedings taken by one Ganesh Singh on the basis of a compromise decree obtained by him on the 29th of August, 1907

On the 8th March 1907, Debi Singh had executed a deed of usufructuary mortgage in favour of Ganesh Singh Possession over the property mortgaged was, however, not given and in consequence Ganesh Singh brought a suit for possession The parties came to terms with each other, with the result that in accordance with the compromise a simple money decree was passed in favour of Ganesh Singh One of the terms of the compromise embodied in the decree was that the decree was not to be executed for 2½ months At the end of this period, as payment had not been made, Ganesh Singh asked the court to attach and bring to sale the property which had formed the subject-matter of the mortgage, dated the 8th of March 1907

The judgment debtor objected that the mortgagee was not entitled to bring this property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage (Order XXXIV, rule 14, of Act No V of 1908)

The court of first instance sustained the objection, and in appeal the order of the first court was upheld

The decree holder comes here in second appeal and urges that the court below has erred in holding that the appellant cannot bring the property in dispute to sale without instituting a suit on the mortgage for sale

(1) Weekly Notes 1905 p 152
(2) (1905) I L R 28 All 58
(3) (1909) 6 A L J 731
(4) (1901) 6 C W N 261

The following was the material portion of his judgment on this point:—

"In 1892 Munnu Lal brought a suit against the plaintiffs and their brothers for the recovery of the money due to him under the deed dated 20th December 1889 It appears that the plaintiffs' certificated guardian, Dastgir, did not defend that suit Plaintiffs' mother and their brother Razzak, who had then attained majority, represented to the court that Dastgir was not a proper person to act as guardian of the minors Abbas and Sarfaraz (the present plaintiffs) The court appointed Razzak to act as guardian *ad litem* of the present plaintiffs Razzak appointed Munshi Qurban Ahmad, pleader, to defend the suit on behalf of the present plaintiffs Thus, all proper steps were taken to see that the suit was properly defended on their behalf It was pleaded on their behalf that the deed in question was not executed for their benefit and was not binding on them, and that it was void, having been executed by their certificated guardian without the permission of the District Judge

On the 14th November 1894 the court found that the minors were not liable to pay the sum of Rs 820 (a sum charged as 'commission and compensation for saving the property') and interest thereon, and that they along with their brothers, were liable to pay the rest of the mortgage money amounting to Rs 7,623 The case went up on appeal to the court of the Judicial Commissioner of Oudh The present plaintiffs were represented by a pleader in that court also On 13th July it was decided by the Additional Judicial Commissioner that the sum of Rs 9 237 9 8 was due to the mortgagee, Munnu Lal The objectionable item of Rs 820 was not decreed against the present plaintiffs

' I am of opinion that the said decree is binding on the plaintiffs

' We find the following passage in Trevelyan's 'Law relating to minors,' edition of 1897, pages 295 296

'If he (the minor) be properly represented by a next friend or guardian for the suit and there be no fraud or collusion on the part of his next friend or guardian or of the opposite party, and his next friend or guardian be not guilty of gross negligence a minor is as much bound by a decree made in a suit to which he is a party, whether it be made for his benefit or not, as if he were of full age and it can be executed against him and his property as the case may be in accordance with law'

"In the present case there is nothing to show that there was any fraud or collusion on behalf of the plaintiffs' guardian or the opposite party, nor it is made out that their guardian acted with gross negligence On behalf of the plaintiffs I was referred to the case of *Mata Din v Ali Mirza* (1) In that case the minors were represented in the suit by the guardian who had executed the mortgage and who could not plead the invalidity of his own act

' In the present case the certificated guardian, Dastgir, who had executed the deed on behalf of the minors was not allowed to act as their guardian in the suit Another person Razzak, was appointed their guardian *ad litem* who defended the suit with the help of a pleader and urged all those pleas which were now urged before me The suit was tried on the merits, and the property

(1) (1902) 5 Oudh Cases, 197.

money The judgement-debtor s appl ca on was not accompan ed as it should have been by court fee stamps in payment of the expenses of the sale *Held* on appl cat on by the au t on purchaser for refund of the money d posited by him that the court would hav exer se l a proper d scr on in allowing a refund as prayed and it was allowe' subject to payment by the appl cant of the expenses of the sale

THE facts of this case were as follows —

A house was sold at auction, for the sum of Rs 2,200, in execution of a decree The applicant, Mathura Prasad was the purchaser Instead of depositing in accordance with order XXI, rule 84, of the Code of Civil Procedure Rs 550 (being 25 per cent on the amount of his purchase money), he deposited Rs 1,000 The balance of the purchase money, which should have been paid within 15 days of the sale, was not, owing to certain circumstances paid up The judgement debtor applied under order XXI, rule 82 of the Code to have the sale set aside, and the sale was set aside and the decree satisfied The auction purchaser thereupon applied for refund of the Rs 1,000 which he had deposited The application was refused He then came in revision to the High Court

Babu *Harendra Krishna Mukerji* (Babu *Jogindro Nath Chaudhri* with him), for the applicant, contended that under the circumstances of the case the amount deposited should not be forfeited, and that, at all events, that part of the deposit which was in excess of 25 per cent of the sale price could not, under the law, be forfeited

What the court was empowered under order XXI, rule 86 of the Code, to order to be forfeited was the deposit of 25 per cent of the purchase money, and nothing more This was obvious from reading together rules 84 and 86 of order XXI "The deposit" which could be forfeited under rule 86, was the same as the "deposit of 25 per cent" specified in rule 84 The court, therefore, had no jurisdiction to order forfeiture of any sum deposited in excess of the said 25 per cent, such a sum being practically a portion of the amount to be paid in under order XXI, rule 85 Then, as to the deposit as a whole, the sale having been set aside under order XXI, rule 89, no part of the deposit should be ordered to be forfeited Under section 308 of the former Code it was obligatory to order forfeiture, the words were

required by section 456, Code of Civil Procedure He asks this Court to consider the irregular or illegal action of the other Court

"The ruling *Mata Din* v *Ali Mirza* (1) lays down that the mother of two minors who had herself executed a mortgage of their property having been appointed their guardian *ad litem* in a suit brought by the mortgagee to enforce the mortgage in which he obtained a decree, the decree did not stand in the way of the minors in a suit brought by them to set aside the mortgage-deed There it was held that such a suit was the only remedy that the minors had against a mortgage executed by the person who was appointed their guardian *ad litem* in the suit brought to enforce the mortgage It may be implied that the reason for the decision of the learned Additional Judicial Commissioner was that the mother having herself executed the deed was illegally appointed by the Court guardian *ad litem* in that the Court appointed a person who had an interest in the suit adverse to that of the minors

"Similarly Ghulam Razzak was one of the executants of the mortgage-deed in favour of Babu Munnu Lal, and this fact should have furnished another reason to the Court for not appointing him guardian *ad litem* It may be assumed that the Court in appointing him on his mere application and without the affidavit required by section 456, Code of Civil Procedure, acted illegally I am of opinion therefore that in the former suit the minors were not properly represented and that consequently the decree passed in that suit is not binding on them"

MR. B. GREEVEN said —

"The point here involved is that two minors who were represented by a guardian *ad litem* in a suit instituted against them to enforce the mortgage seek to impeach the decree and the instrument underlying it on the ground that the order of the Court appointing the guardian was wholly illegal because the imperative provisions of section 456 did not receive compliance I may remark at the outset that I would not give effect to any such contention if the provisions of the section had been disregarded in a matter of office procedure which could not have prejudiced the minors interests (*Mungniram Marwari* v *Gursahai Nund* (2) *Walian* v *Banke Behari Pershad Singh* (3) but in the present instance it is manifest from the record itself that the provisions of section 443 which are imperative and disregard of which renders the decree a nullity (*Hanuman Prasad* v *Muhammad Ishak* (4) received no compliance whatever The Court was bound to see that the application was supported by 'an affidavit verifying the fact that the proposed guardian has no interest in the matters in question in the suit adverse to that of the minor and that he is a fit person to be so appointed.' No affidavit was presented and the Court made no inquiry into the applicant's fitness I do not think that by virtue of being an executant of the instrument in suit, he had an interest adverse to that of the minors, but he was hampered in his defence by the difficulty of having either to admit the document to be impeached on their behalf or to challenge it by denying the validity of his own act as far

(1) (1902) 5 Oudh Cases 197

(2) (1889) I. L. R., 17 Calc., 347; L. R. 16 I. A., 195.

(3) (1903) I. L. R., 30 Calc., 1021; L. R., 20 I. A. 187

(4) (1905) I. L. R., 28 Calc., 137.

and must prevail. As regards the balance he contends that the Code of 1908 gives the court discretion, which the Code of 1882 did not, and that the court was no longer compelled to forfeit this deposit to Government. The Code of 1908 does give the court discretion, and we think that the court should have, in the present case, exercised that discretion. At the same time, owing to what had taken place apparently between the judgement-debtor and the purchaser, the expenses of the sale appear never to have been paid into court. While, therefore, we set aside the order of forfeiture regarding the remainder also, we under the circumstances of the present case, direct that the purchaser will be entitled to recover the sum deposited by him upon his depositing by way of court fees such sum, if any, as should have been deposited by the judgement debtor when he petitioned the court to set aside the sale. We make no order as to costs.

*Application allowed.*

## APPELLATE CIVIL.

*Before Mr Justice Tudball and Mr Justice Piggott*

DIPAN RAI AND OTHERS (DEFENDANTS) *v* RAM KHELAWAN (PLAINTIFF) *

*Act (Local) No II of 1901 (Agra Tenancy Act), sections 10 and 20—Act No IX of 1872 (Indian Contract Act), section 65—Usufructuary mortgage of sir lands—Possession not delivered to mortgagee—Suit to recover possession not maintainable*

To secure repayment of money advanced to them by the plaintiff the defendants executed a usufructuary mortgage of certain *sir* land, but did not give possession. The mortgagee sued to recover possession of the land or to realize the mortgage debt by sale. *Held* that neither relief was open to him but he could treat the mortgagees as exproprietary tenants and get rent assessed against them. *Murlidhar* v *Pem Raj* (1) followed. *Jijibhai Laldas* v *Nagji Gulab* (2) distinguished.

THE facts of this case were as follows:—

The defendants executed a usufructuary mortgage in favour of the plaintiff in respect of some plots of *sir* land on the 11th July, 1905, and covenanted as follows:—

"This field the creditor may keep in his own possession or may have it cultivated through sub-tenants. The creditor may

* Second Appeal No 7 of 1909 from a decree of Sri Lal, District Judge of Ghazipur, dated the 22nd of September 1908, confirming a decree of Baij Nath Das, Munsif of Ghazipur, dated the 22nd of June 1908

(1) (1899) I L R, 22 All, 205 (2) (1909) 11 Bom, L R, 693.

*Ross* for the respondent (called on as to whether the respondents had been properly represented) contended that the provisions of section 456 of the Code of Civil Procedure not having been strictly complied with, the guardian *ad litem* must be taken not to have been properly appointed, and the proceedings to have been therefore not binding on the respondents as their interests were not properly represented in the litigation He referred to a passage from the judgement of the Second Additional Judicial Commissioner in which he said —"The appointment was made in disregard of two of the safeguards imposed by section 456 of the Code of Civil Procedure In the first place a mere application, unsupported by the affidavit declared by that section to be essential was accepted without the slightest inquiry In the second place if he (Ghulam Razzak) had no interest adverse to that of the minors, he was certainly a person unfit to be appointed to represent them He was one of the executants of the documents in suit, and the only method open to him for escaping from liability was a plea, which involved at least a suspicion of fraud, that he was a minor at the time of the execution moreover, so illiterate that, as noticed by the Court he had been unable even to sign his name in executing the in suit" It was submitted that the decision of the Judicial Commissioners was correct and should be upheld

*DeGruyther*, *K C*, in reply

1910, *March 8th* —The judgement of their Lordships was delivered by LORD MACNAGHTEN—

Their Lordships are of opinion that the decision of the Subordinate Judge was perfectly right

The question is whether the respondents in whose a former decree, made when they were infants, has been aside, were properly represented at the hearing of the suit which the decree was pronounced

The objection was that the affidavit required by section 456 of the Code of Civil Procedure is not forthcoming It does not appear whether in point of fact there was an affidavit or not But assuming that there was not such an affidavit their Lordships think it impossible now to hold that the infants were not properly represented at the time The learned Judge appointed

*Harnandan Rai* v *Nal chhel Rai* (1) and *Ram Sarup* v *Kishan Lal* (2). The covenant itself being illegal, stipulation to pay damages in the event of breach of such covenant also was illegal, *Taylor* v *Chester* (3), *Laxman Lal K Pandit* v *Mulshankar* (4), *Gopalrao* v *Kallappa* (5)

Dr *Satish Chandra Banerji* (with him Babu *Parmeshwar Dayal*), for the respondent, submitted that the appellant had divided the deed into two sections, viz, (1) usufructuary mortgage of proprietary rights and (2) usufructuary mortgage of exproprietary tenancy This was not the correct interpretation of the deed There being a personal covenant to pay, the mortgage was anomalous, and a suit to recover the money could be brought. Even on the assumption that there was a usufructuary mortgage of the exproprietary tenancy the parties were not *in pari delicto*, because the High Court under the old Rent Act had held that a usufructuary mortgage of an occupancy holding was valid, and it was not till 1906, i e, after the execution of this mortgage, that the High Court decided that the law had been altered by the new Tenancy Act Under the circumstances the mortgagee was entitled to recover his money under section 68 (*b*) of Act IV of 1882, for, possession not having been delivered, the mortgage security did materially diminish *Ganesh Singh* v *Sujhari Kuar* (6)

If the mortgage failed by reason of the prohibition contained in the Tenancy Act, section 65 of the Contract Act applied and the mortgagee could recover the money under that section, *Jijibhai Laldas* v *Nagji Gulab* (7), *Gulab Chand* v *Fulbai* (8) Moreover the transaction was really one of loan, and the bond a simple money bond Some money was advanced, and there were two ways pointed out in which the creditor s claim might be discharged, viz (1) by putting the creditor in possession, and (2) by repaying the money with interest There was an express covenant to pay the money, this was separable from other covenants in the deed and might be enforced He referred

m

the appellant's application the same Bench held that under the circumstances it was not a case in which they ought to exercise their discretionary power of revision.

*Held* by the Judicial Committee that if the order of amendment was without jurisdiction as altering a decree after it had been amended on appeal the alteration was equally ineffectual in the appellant's case as in the case of the other decree-holder and should not have been allowed to stand, and the appeal was therefore decreed.

APPEAL *from a judgement and decree* (23rd Februray 1905) of the High Court at Allahabad which rejected an application made by the appellant for revision of an order (11th June 1904) passed by the Subordinate Judge of Moradabad amending a decree of his court of 30th January 1901

The main facts necessary for the determination of this appeal are set out in the judgement of their Lordships of the Judicial Committee The decree amended by the Subordinate Judge was a mortgage decree under section 88 of the Transfer of Property Act (IV of 1882). A decree absolute following thereon had been made on 5th October 1901 under section 89 of the same Act, and the decree of 30th January 1901 had been affirmed by the High Court on appeal on 1st December 1902

The application for amendment was made by the respondent (the mortgagor and judgement debtor in the litigation) on the ground that whereas the judgement of 30th January 1901 gave to the mortgagee no interest *pendente lite* or future interest, the decree based on it allowed such interest making the total amount due under the decree about Rs 19000 more than it should have been under the terms of the judgement

On the application the Subordinate Judge held that section 209 of the Civil Procedure Code (which it was contended for the decree-holders allowed the awarding of interest in the decree notwithstanding that the judgement was silent about such interest) was not applicable on the ground that a mortgage decree was not a "decree for money," and that the cases deciding that "when a decree is affirmed on appeal the only decree which can be amended is the decree to be executed, and the decree to be executed is the decree of the appellate court," were distinguishable from the present case He concluded as follows :—

"Unlike the above cases the decree-holders in the case before me applied for a decree under section 89 of Act IV of 1882 on the basis of the original decree

as a matter of fact by the courts below that the defendants did not place the plaintiff in actual physical possession of the *sir* land.

The plaintiff came into court asking for the following reliefs —(*a*) actual possession over the lands in suit with damages, or (*b*) in the alternative, for a decree for sale of the mortgaged property with costs and future interest, to recover Rs 599 principal and Rs 111 interest by way of damages The courts below have held that the plaintiff was not entitled to actual physical possession over the *sir* lands, inasmuch as the defendants became exproprietary tenants on the execution of the document, and as such were entitled to hold and cultivate the lands on payment of rent. They have further held that by reason of the plaintiff not having got actual possession from the defendants, there has been diminution in the security offered by them, and under section 68, Transfer of Property Act, the former was entitled to recover the money, and accordingly they granted him a simple money decree only The defendants have now appealed to this court and urge that in so far as the contract between the parties was for delivery of possession of the exproprietary tenure which came into existence on the execution of the mortgage it is void, but that in so far as it is a mortgage of proprietary rights, the contract was a perfectly legal one, and as the appellants are ready to pay any rent which may be fixed upon their exproprietary tenure the plaintiff is not entitled to any relief whatsoever. There can be no question that directly the mortgage was executed the appellants became exproprietary tenants of the lands, and, as such, were entitled to continue in cultivatory possession on payment of rent In so far as the contract may be deemed to be an usufructuary mortgage of the exproprietary tenure, there can be no doubt that it is void in view of the terms of sections 10 and 20 of the Tenancy Act In the case of *Murlidhar* v *Pem Raj* (1), which was decided under the old Act No XII of 1881, it was held that if the vendor of land contracts to put the vendee in cultivatory possession of the *sir* land, the contract is void and the vendee cannot recover any

(1) (1899) I L R 22 All 205

case it was not one in which they ought to exercise their discretionary power in revision: they therefore rejected the application

On this appeal, which was heard *ex parte*—

*DeGruyther, K. C*, and *Ross* for the appellant contended that having found that the order of the Subordinate Judge was made without jurisdiction the High Court was wrong in setting it aside only so far as it concerned Lachman Das. That court should have declared it inoperative altogether, and against all persons whom it purported to affect. The order was one relating to a joint and several decree in favour of all the decree-holders, and could not properly remain valid as against the appellant, and at the same time be set aside so far as it affected the other decree holders. Reference was made to Civil Procedure Code (Act XIV of 1882) sections 206 and 209; and Maxwell on Statutes, page 335

1910, *April 19th*.—The judgement of their Lordships was delivered by LORD COLLINS:—

The story out of which the points involved in this appeal arise is rather intricate. On the 5th March 1898 the appellant and two persons named Kishori Lal and Sri Ram instituted a suit against the predecessor in title of the respondent before the Subordinate Judge of Moradabad, for the recovery of more than a lakh of rupees with future interest, by sale of property mortgaged under two documents dated respectively the 11th May and the 13th December 1894 On the 6th May 1898, the claim was decreed by the First Court, but on appeal to the High Court at Allahabad that Court took the view that the learned judge had placed undue pressure upon the defendant, who had asked for a postponement on the ground of illness, to go on with the case, and accordingly set aside the decree which he had made and remanded the case for determination according to law.

On the 30th January 1901, the case came again before the Subordinate Judge of Moradabad and resulted in a decree for Rs 70,257-14 0, with future interest Meanwhile Kishori Lal and Sri Ram had sold the whole of their interest in the decree to one Lachman Das, to whom the present appellant also transferred a part of his interest as a decree-holder, and the name of Lachman Das was added to the record From this decree both parties appealed to the High Court The High Court dismissed the

defendants, who would be entitled to redeem the mortgage on the date mentioned in the mortgage bond. In the present case the plaintiff is not entitled to any relief whatsoever. In this view of the case, we allow the appeal, set aside the decrees of the courts below and dismiss the plaintiff's suit with costs in all courts.

*Appeal decreed.*

---

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji*

HARCHARAN AND OTHERS (PLAINTIFFS) *v* BINDU AND OTHERS (DEFENDANTS) *

*Suit for profits—Limitation—Adverse possession—Profits collected by co-sharers—Suit by other co sharers to recover their shares.*

Co-sharers who collect profits for other co sharers are in a position similar to that of a lambardar Where no adverse title has been set up, the mere fact that a co-sharer plaintiff has not received profits for more than twelve years before suit will not bar his claim

*Raj Bahadur* v *Bharat Singh* (1) and *Mihin Lal* v *Badri Prasad* (2) followed.

THIS was an appeal under section 10 of the Letters Patent from a judgement of AIKMAN, J. The facts of the case sufficiently appear from the judgement under appeal, which was as follows.—

"The respondent Kali Charan brought a suit to recover a share of the profits of certain *shamlat* land belonging to a village in which he owns a share None of the defendants was a lambardar They were co-sharers in the village The court of first instance found that there was no evidence that either the plaintiff or his predecessor in title had ever received any profits of his share in the *shamlat* land and dismissed the suit on this ground On appeal the learned District Judge professing to follow the ruling in *Mihin Lal* v *Badri Prasad* (1) gave the plaintiff a decree The defendants come here in second appeal In the case relied on by the learned Judge it will be seen from the concluding portion of the judgement at page 439 that great stress was laid on the fact that the defendant was a lambardar and it was remarked that the possession of a lambardar is not adverse possession In my opinion the same principle cannot be applied to the case of co sharers If the defendants here appropriated to themselves the whole profits of the *shamlat* land, they thereby, I hold, gave notice to the plaintiff that they were setting up a title adverse to him, and if they did so for upwards of 12 years, as in this case, the plaintiff s claim would be barred A case like the present is distinguishable from the case of co-owners in a joint family. In my opinion the Assistant Collector was right I allow the appeal with costs, set aside the decree of the lower appellate court with costs and restore that of the court of first instance"

---

* Appeal No. 58 of 1909 under section 10 of the Letters Patent.

(1) (1904) I. L R., 27 All, 243. (2) (1905) I L R, 27 All, 435.

1905, delivered separate judgements disposing of the two applications for revision in the following manner:

With regard to the application 24 of 1904, they observed that the order revision of which was asked for was an order passed by the Subordinate Judge of Moradabad amending a decree of his Court. Previous to the order of amendment the decree had been affirmed on appeal by the High Court. The Subordinate Judge therefore had no jurisdiction to amend. The learned judges therefore allowed the application and set aside the order amending the decree, but only so far as it affected the interests of the applicant Lachman Das. With regard to the application for revision 32 of 1904 of Brij Narain the learned judges delivered the following judgement:

"Looking to all the circumstances of the case, we do not think that this is a case in which we ought to exercise our discretionary power in revision. We reject the application, but make no order as to costs"

Dissatisfied with the judgement and decree of the High Court made on the said application 32 of 1904, the present appellant applied for leave to appeal therefrom to His Majesty in Council. His application was heard by The Honourable The Chief Justice and the Honourable Sir W. R. Burkitt.

When granting the application their Lordships, after referring to the facts of the case, made the following observations:—

"A Bench of this Court on the application by Lachman Das allowed the first application, holding that the Subordinate Judge had no power to modify his decree after it had been confirmed by the High Court and set aside the order complained of In the other application No 32 of Brij Narain, the Bench made an order rejecting it, holding that, under all the circumstances of the case, this was not a case in which they should exercise their discretionary power in revision. The consequence is that there are now two joint decree-holders, as to one of whom the decree contains a provision for future interest the value of which is Rs 19,000 odd, whilst as to the other this provision does not exist. The provision of the decree therefore seems to be apparently inconsistent, as out of two joint decree-holders one can execute the decree *plus* future interest, whilst the other cannot. Under these circumstances we think this is a case which we should certify to be fit for appeal."

Their Lordships have not had the advantage of hearing the case argued for the respondent, but they think the High Court have themselves said enough to make it clear that if the decree of the First Court was made without jurisdiction as altering a decree after it had been affirmed on appeal in the case of

whole co parcenary body We fail to see any such distinction Co sharers who make collections for themselves and other co-sharers are in the same position as regards the amounts collected as a lambardar In the case of a lambardar it was held in *Mohan Lal* v *Badri Prasad* (1) that the fact that a co sharer plaintiff has received no profits for 12 years previous to the suit from the lambardar is not by itself sufficient to bar the suit in the absence of evidence that the defendant lambardar was during those 12 years holding adversely to the plaintiff In this case the ruling in *Raj Bahadur* v *Bhawant Singh* (2) was approved of That was a case in which a co sharer in an undivided mahal claimed to recover a share in the profits of certain *sir* land appertaining to the mahal It was held that the mahal being undivided the defendant's possession of the *sir* land had never really been possession hostile to the plaintiff and in the absence of any repudiation of the right of the plaintiff or his predecessor in title to enjoy the profits or to be in possession of their share of the *sir* lands, the claim was not time barred The principle of these rulings fully applies to the present case The learned Judge of this Court says —' If the defendants have appropriated to themselves the whole profits of the *shamlat* land, they thereby, I hold, gave notice to the plaintiff that they were setting up a title adverse to him, and if they did so for upwards of 12 years, as in this case, the plaintiff's claim would be barred" We wholly disagree with this view The appropriation of profits cannot be regarded as notice to the co sharers that their title was repudiated As it was found in his case by the lower appellate court that the plaintiffs' title was never denied and that there was no evidence of any adverse claim on the part of the defendants for a period of 12 years, the plaintiffs' claim was not time barred, and the lower appellate court was right in decreeing it

We accordingly allow the appeal set aside the decree of this Court and restore that of the lower appellate court with costs

*Appeal decreed*

(1) (1905) I L R 27 All, 43 (2) (1904) I L R 27 All 346

1905, delivered separate judgements disposing of the two applications for revision in the following manner:

With regard to the application 24 of 1904, they observed that the order revision of which was asked for was an order passed by the Subordinate Judge of Moradabad amending a decree of his Court. Previous to the order of amendment the decree had been affirmed on appeal by the High Court. The Subordinate Judge therefore had no jurisdiction to amend. The learned judges therefore allowed the application and set aside the order amending the decree, but only so far as it affected the interests of the applicant Lachman Das. With regard to the application for revision 32 of 1904 of Brij Narain the learned judges delivered the following judgement:

"Looking to all the circumstances of the case, we do not think that this is a case in which we ought to exercise our discretionary power in revision. We reject the application, but make no order as to costs"

Dissatisfied with the judgement and decree of the High Court made on the said application 32 of 1904, the present appellant applied for leave to appeal therefrom to His Majesty in Council. His application was heard by The Honourable The Chief Justice and the Honourable Sir W. R. Burkitt.

When granting the application their Lordships, after referring to the facts of the case, made the following observations:—

"A Bench of this Court on the application by Lachman Das allowed the first application, holding that the Subordinate Judge had no power to modify his decree after it had been confirmed by the High Court and set aside the order complained of In the other application No 32 of Brij Narain, the Bench made an order rejecting it, holding that, under all the circumstances of the case, this was not a case in which they should exercise their discretionary power in revision. The consequence is that there are now two joint decree-holders, as to one of whom the decree contains a provision for future interest the value of which is Rs. 19,000 odd, whilst as to the other this provision does not exist. The provision of the decree therefore seems to be apparently inconsistent, as out of two joint decree-holders one can execute the decree *plus* future interest, whilst the other cannot. Under these circumstances we think this is a case which we should certify to be fit for appeal."

Their Lordships have not had the advantage of hearing the case argued for the respondent, but they think the High Court have themselves said enough to make it clear that if the decree of the First Court was made without jurisdiction as altering a decree after it had been affirmed on appeal in the case of

He waited until his mother was dead The defendant could not be expected to produce the bonds and the delay caused great difficulty to the defendant. One of the pleas raised is that the suit is barred by Act 91 of the Limitation Act XV of 1877. The authorities on this subject are not very clear I think that it may be safely laid down that article 91 does apply to cases in which it is necessary that the deed should be set aside, that is to say to cases in which the plaintiff cannot get his property until the deed is set aside The court of first instance held that the consideration to some extent failed, and gave the plaintiff a decree for possession of a proportionate part of the property The lower appellate court gave the plaintiff a decree for possession of all the land and cancelled the sale deed on condition of the plaintiff's paying Rs 285 within a time named If the money was not paid the suit was to be dismissed

"Having regard to the fact that at the time the sale-deed was executed, a decree was actually out against the plaintiff, and further that the decree is referred to and mentioned in the sale-deed and also to the fact that the main object of the sale was to satisfy the decree I think that the sale-deed may fairly be treated as if it were a deed expressly made by Musammat Bhawani as guardian of the minor If it was so made and if it was not fraudulent (and void on this account) I think it must be considered as the deed of the plaintiff himself The act of a guardian of a minor as such is the act of the minor It was necessary therefore for the plaintiff to set the deed aside before he could regain possession of his property His own plaint and the prayers contained therein demonstrate that he and his advisers considered that the deed must be got rid of before the property could be claimed

"I think that having regard to the circumstances of the present case the plaintiff ought to be strictly confined to his plaint On the facts of the case, I held that article 91 of the Limitation Act XV of 1877 does apply and the suit is barred by limitation

"I therefore allow the appeal, set aside the decrees of both the courts and dismiss the plaintiff's suit with costs in all courts"

The plaintiff appealed on this appeal.

Maulvi *Ghulam Mujtaba*, for the appellant, submitted that the suit being one for possession of immovable property was governed by Article 144 and not Article 91 of the Limitation Act, and relied on *Abdul Rahman* v. *Sukh Dayal Singh* (1).

Munshi *Gulzari Lal*, for the respondents, submitted that, apart from the question of limitation, the finding of the first court of appeal being that the sale by the guardian was for the benefit of the minor, the suit ought to have been dismissed. As to the question of limitation, he contended that the case in I. L. R., 28 All., 30 related to the transfer by a guardian which was beyond his power and not to a valid transfer for the benefit of the minor. He cited *Hasan Ali* v. *Nazo* (2), *Chunder Nath*

(1) (1905) I L R, 28 All, 30 (2) (1889) I L R., 11 All., 456.

inoperative as being passed against a dead person A similar application was also made by the wife and children of Nanhu The court held that only the share of Nanhu, which was inherited by his wife and children, should be exempted, as they were not brought upon the record It refused to order the delivery of the whole property On appeal by the present appellants, this order was confirmed The two judgement debtors, thereupon, appealed to the High Court

Pending this second appeal, the decree holder also applied to the High Court, on 23rd January, 1909, for review of its judgement in S A. 588 of 1905 delivered on 15th April, 190 and referred to above, on the ground that as one of the defendants respondents had died before judgement and his representatives were not brought on the record, the appeal should be reheard after the representatives were brought on the record, so that a proper decree might be passed

The decree holder's application for review and the judgement debtors' appeal were heard together

Mr *Nihal Chand*, for the judgement debtors appellants —

The entire decree is incapable of execution It was a decree in a pre emption suit and the decree was indivisible One of the defendants having died and his representatives not being brought upon the record, the whole suit abated, as the right to sue did not survive as against the remaining respondents He referred to the Code of Civil Procedure, 1908, order XXII, rule 4, and the Code of Civil Procedure, 1882, section 368, and relied on *Arzani Bakhsh* v *Shere Ali* (1), *Kashi Nath* v *Mukta Prasad* (2) *Makundi* v *Sarabsukh* (3), *Ram Dayal* v *Magu Lal* (4) and *Raj Chunder Sen* v *Ganga Das Seal* (5)

As regards the application for review, it was presented long beyond the time prescribed by Article 173 of the Limitation Act, viz , 90 days, and no sufficient cause was alleged for the delay Moreover, even if the application for review were granted, the time prescribed for bringing the representatives of a deceased respondent on the record had expired

(1) Weekly Notes 1882 p 79
(2) Weekly Notes, 1884 p 119
(3) Weekly Notes, 1884 p 144
(4) Weekly Notes 1884 p 165.
(5) (1901) I. L. R. 31 Calc., 487.

and he applied to it the provisions of article 91 of schedule II of the Indian Limitation Act, No XV of 1877 and dismissed the suit in its entirety From the judgement of the learned Judge of this Court this appeal and the connected appeal No 83 of 1909 have been preferred It is contended that article 91 of schedule II of the Limitation Act of 1877 does not apply to a case like this In our judgement this contention is well founded The suit of the plaintiff is not one to set aside a document executed by himself, but to recover immovable property belonging to him, which, according to him, had been alienated by his guardian without valid authority to do so Such a suit is in reality a suit for the recovery of immovable property, and the prayer for a declaration that the sale does not affect the plaintiff's rights is only ancillary to the substantive claim for possession As was pointed out by the Madras High Court in *Unni* v *Kunchi Amma* (1) — "When a person seeks to recover property against an instrument executed by himself or one under whom he claims, he must first obtain the cancellation of the instrument, and the three years' rule enacted by article 91 applies to any suit brought by such person" But "where an instrument of alienation is executed by a person who is not the full owner of the property but has only conditional authority to dispose of it, that article would not apply" The learned Judges proceed to observe — Such are the cases of a guardian of a minor, the manager of a Hindu family or the sonless widow in a divided Hindu family In these cases, as was argued by the appellant's vakil, it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up, because, as between the parties to it it may be a perfectly valid instrument All that is needed is a declaration that the plaintiff's interest is not affected by the instrument, and that declaration is merely ancillary to the relief which may be granted by delivery of possession" A similar view was held by this court in several cases, of which we may refer to the case of *Abdul Rahman* v *Sukh Dayal Singh* (2) The same principle was laid down in

(1) (1890) I L R 14 Mad 26 (2) (1905) I L R 28 All, 30

applied to this Court to bring on the record the representatives of Nanhu and to rehear the appeal. Instead of taking this course, he attempted to execute the decree. The present application purports to be under order XLVII, rule 1 of Act V of 1908, *i. e*, an application for review of judgement by a person considering himself aggrieved. We must remark at once that the time limited for such an application is 90 days from the date of the decree The present application was not made until the 23rd of January, 1909, nearly two years after the decree. Even if we were to treat the application as one to bring on the record the representatives of Nanhu deceased, such an application should have been made within six months of the death. The applicant having taken the course he did take, we see no reason for extending limitation, even assuming that we have the power to do so.

We now have to deal with the appeal. Mr. *Agarwala* on behalf of Sudarath Rai, contends that the execution should be allowed to stand against those persons who were on the record at the time the decree was passed, and cites in support of his contention the case of *Imdad Ali* v *Jagan Lal*(1). In that case, as in the present case, a decree had been passed against a deceased judgement debtor in ignorance of the fact of his death. The representatives in execution objected and the court held that the question was one which properly arose under section 244 of Act XIV of 1882. The execution was set aside as against the representatives of the deceased and it was allowed to stand as against the other judgement-debtors. In that case the decree was clearly treated as being capable of execution against some of the judgement-debtors to the exclusion of the representatives of the deceased. The question was not argued that it was a judgement which could be only executed in whole or not at all. The decree in the present case was a decree for pre-emption and the entire property, if it was a good decree regularly made, could have been taken in execution. In the case of *Raj Chunder Sen* v *Ganga Das Seal* (2), the respondent to whom money was due under a decree died pending an appeal from the decree No application was made to have the representatives substituted within six months and no sufficient cause was shown for the

(1) (1895) I. L. R., 17 All., 478 (2) (1904) I. L. R., 31 Calc., 487.

v. *Baldeo Singh* (1), in which the widow of a separated Hindu had sold property belonging to the estate of her deceased husband, and the sale as to a portion of the consideration was justified by legal necessity, and as to the remainder of the consideration not so justified. It was held that it was competent to the next reversioner to sue for and obtain a decree for the property on payment of such portion of the consideration as represented moneys borrowed by the widow for legal necessity. The principle laid down in that case applies to a sale by a guardian where a part only of the consideration was such as was binding upon the minor. The same view was held in the case of *Ram Dei Kunwar* v. *Abu Jafar* (2) For these reasons we are of opinion that the decree of the lower appellate court was right We accordingly allow the appeal, set aside the decree of this Court, and restore that of the lower appellate court with costs. We extend the time for payment of Rs 285 mentioned above for a period of two months from this date.

*Appeal allowed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Tudball*

EMPEROR v. MAHADEO *

*Criminal Procedure Code* (1898), *sections* 182, 531—*Jurisdiction—Place at which consequence of act ensues—Criminal breach of trust—Act No XLV of* 1860 *(Indian Penal Code), section* 408.

One M was employed as an agent by a firm in Mirzapur Goods were entrusted to him for sale in various districts in Lower Bengal, and from time to time, as he sold goods, he remitted money to his employers at Mirzapur When called upon to furnish accounts, he offered to furnish Rs 500 as a deposit, but did not submit any account.

*Held* that the Courts at Mirzapur had jurisdiction to try M for whatever offence he had committed arising out of the above transactions *Queen Empress* v. *O'Brien* (3) followed

THE accused in this case was employed as an agent by a firm in Mirzapur. Goods were entrusted to him for sale in various districts in Lower Bengal, and from time to time, as he sold

* Criminal Revision No. 30 of 1910, from an order of Muhammad Ali, Sessions Judge of Mirzapur, dated the 4th of December 1909

(1) (1903) I. L R, 25 All, 330 (2) (1905) I L R, 27 All, 494.
(3) (1896) I L R, 19 All, 111

STANLEY, C. J. and BANERJI, J—This appeal arises out of a suit for partition, and the facts shortly are these Ganesh Dat, one of the plaintiffs, is the son of one Pandit Baldeo Dat Joshi, deceased, and the other plaintiff, Kashi Dat, is his son The defendant, Durga Dat, is the brother of Ganesh Dat Baldeo Dat died about 26 years ago, leaving his wife and two sons him surviving Ganesh Dat was at this time about 25 years of age, while Durga Dat was a lad of about seven years Ganesh Dat devoted himself to the study of astrology, and with a view to uninterrupted study he, in the lifetime of his father, withdrew to and lived in seclusion in a garden house of the Maharaja of Damraon, leaving his mother, his wife and his brother in the ancestral house of the family After his father's death he lived for several years in the same garden house, but some years ago he built a new house and has been living in that house apart from the other members of the family ever since Ganesh Dat became a distinguished astrologer and attracted the attention of notable Indian gentlemen, amongst others, Their Highnesses the Maharajas of Benares and Vizianagram and the Raja of Sarguja and others For his services to his clients as an astrologer he received considerable sums of money which were invested in various ways The ancestral property of the family had never been partitioned, and the suit out of which this appeal has arisen was instituted by Ganesh Dat and his son for partition of that property The property so sought to be partitioned included a sum of Rs 5,530, deposited by Baldeo Dat in the kothi of Babu Sita Ram Kesho Ram, and also a sum of Rs 940 in deposit in the same kothi, alleged to represent money deposited by Ganesh Dat on account of income of the village of Kodupur The defendant in his written statement alleged that the money deposited in the kothi of Babu Sita Ram Kesho Ram, did not belong to Baldeo Dat, but formed part of the estate of his mother, and that she before her death made an oral will and thereby gave the money in question to the defendant's wife and gave ornaments equal in value to the sum so deposited to the wife of Ganesh Dat He further alleged that Ganesh Dat and he were not separate in food, but that on the contrary up to the month of *Bhadon Sambat* 1961, he and the plaintiff remained joint, and the business carried

where the applicant travelled in order to sell his master's goods Section 182 of the Code would apply, it seems to me, equally well. But even if there be any such irregularity, section 531 is clearly a bar to the interference by this Court in the matter merely on this ground The second point pleaded is that the matter is merely one of a civil nature With this I cannot agree The applicant's behaviour clearly discloses a dishonest intention The sentence in my opinion calls for no interference The applicant was in a position of trust, and fully deserves the punishment which has been awarded I therefore dismiss the application The applicant must surrender and serve out the remainder of his sentence

*Application dismissed*

## APPELLATE CIVIL

*Before Sir John Stanley Knight Chief Justice and Mr Justice Banerji*

ASA RAM (DEFENDANT) v KANHAIYA (PLAINTIFF) *

*Pre emption—Wajib ul arz—Construction of document—Custom or contract*

The wajib-ul arz of a village in the Saharanpur district contained the following declaration on the part of the co sharers — Whereas a new settlement of our village from July 1860 to 1890 for a period of 30 years has been made on a revenue of Rs 484 annually, therefore the agreement of us proprietors and lambardars is that till the term of this settlement and in future till the completion of the next settlement we shall remain bound and carry out— " the reference intended being presumably to subsequent clauses of the document In a later wajib ul-arz of 1295 Fasli the parties stated — In regard to the remaining customs of the village the wajib ul arz of 1267 Fasli should be referred to "

*Held* that the wajib ul arz of 1267 Fasli recorded a contract and not a custom, and that contract had expired with the settlement for which it was entered into *Maratib Husain* v *Alam Ali* (1) and *Budh Singh* v *Gopal Rai* (2) followed

THIS was an appeal under section 10 of the Letters Patent from a judgement of Griffin, J The facts of the case appear from the judgement under appeal, which was as follows —

This is a defendant's appeal The plaintiff's suit for pre-emption was based on the provisions of the wajib ul arz of 1267 and of 1295 Fasli The defence so far as we are concerned with it in the present appeal is that the record of the right of pre-emption in the wajib ul arz was a record of contract

* Appeal No 95 of 1909, under section 10 of the Letters Patent

(1) Weekly Notes 1907 p 285 (2) (1908) I L R 30 All 544

The defendant has preferred this appeal, and the main grounds of appeal relied upon before us are that the family was a joint family up to *Bhadon, Sambat* 1964, and that all acquisitions made by Ganesh Dat formed part of the joint family property, that there was a nucleus of family property, and with its aid, it should be held, the disputed properties representing the earnings of Ganesh Dat were acquired.

The learned advocate for the appellant has laid before us the evidence bearing upon the disputed facts in the case and we have listened to his arguments with attention. The conclusion at which we have arrived is that the learned Subordinate Judge rightly decided the questions of fact raised in the issues. As to the alleged oral will of the widow of Baldeo Dat the defendant has wholly failed to prove it. There is likewise no evidence to satisfy us that the widow of Baldeo Dat gave any jewelry to the plaintiff's wife. We are also satisfied as to the correctness of the findings in regard to the items of property which, in the opinion of the learned Subordinate Judge, were not shown to be in existence.

It only remains to consider the arguments which have been advanced in regard to the property which has been found to be the separate and self-acquired property of the plaintiff and therefore not liable to partition. The appellant's allegation is that all acquisitions of Ganesh Dat made whilst the family remained joint formed joint property of all the members of the family, and as such is partible. As to the manner in which these acquisitions were made we think that the testimony of the plaintiff is altogether reliable. He deposed that at the time of his father's death he was 27 years of age, whilst his brother Durga Dat was only six years old, that he had been living jointly with his father up to the time of his death, and that his father used to supply him with food and clothing, but that as he worked as an astrologer he used to live apart in the Dumraonwala garden, so that nobody might interfere with his work; that he deposited in the kothi of Babu Sita Ram Kesho Ram whatever he earned and did not give the same to his father, that his father gave him his education and that whatever knowledge he had was acquired from his father, that the agreement between him and his father was that he should not take any share in

is of a right arising from contract or existing by custom This question depends upon the provisions of the wajib ul arzes of the village of 1267 and 1295 Fasli The village in question is situate in the Saharanpur district The courts below held that the record was one of a custom and not of a contract, and that therefore, notwithstanding that the settlement had come to an end, the plaintiff was entitled to pre-empt the sale effected in favour of the defendant appellant

In the wajib ul arz of 1267, which is intituled *"wajib ul arz yane dastur dehi mauza Sudhauli"* after setting out the names of the co sharers in the village, there is the following recital — "Whereas a new settlement of our village from July 1860 to 1890, for a period of 30 years, has been made on a revenue of Rs 484 annually, therefore the agreement of us, proprietors and lambardars, is that till the term of this settlement, and in future till the completion of the next settlement, we shall remain bound and carry out" The sentence is incomplete, it not being stated what the signatories to it agreed to carry out But it appears to us to be clearly the intention that they were to carry out the provisions of the document contained in the subsequent clauses and that some such words as 'the provisions herein contained' must be supplied

In the later wajib-ul arz, after dealing with the provisions relating to the payment of rent, partition and other matters, the document concludes with the following words —"In regard to the remaining customs of the village the wajib ul arz of 1267 Fasli should be referred to"

In the courts below reliance was placed by the appellant upon the rulings in *Maratib Husain* v *Alam Ali* (1) and *Budh Singh* v *Gopal Rai* (2) In the first mentioned of these cases the wajib ul arz of the year 1861 declared that the zamindars of the village, which was in the district of Saharanpur, would be bound by and act upon the undermentioned conditions for 30 years, until the completion of the next settlement, and amongst the undermentioned conditions were certain conditions relating to the right of pre emption A fresh settlement was commenced in 1890, and in the wajib-ul arz prepared at the time of that

(1) Weekly Notes 1907 p 265. (2) (1908) I. L R 30 All., 544.

On the question as to what are self acquisitions Manu lays down the general rule that "what a brother has acquired by labour or skill without using the patrimony he shall not give up without his assent, for it was gained by his own exertion" (Manu, IX, clauses 206 to 209) In the Mitakshara the following rule is laid down —"Whatever else is acquired by the co parcener himself without detriment to the father's estate, as a present from a friend, or gift at nuptials does not appertain to the heirs" (Chapter I, section 4, clause 118) This rule is explained by Vijnanesvara to mean that the phrase "anything acquired by himself without detriment to the father's estate" must be every where understood and it is thus connected with each member of the sentence, namely, 'what is obtained from a friend without detriment to the paternal estate, what is received in marriage without waste of the patrimony, what is redeemed of the heredi tary estate without expenditure of ancestral property, what is gained by science without use of the father's goods" The learned advocate for the appellant relied upon the definition given by Katyayana of wealth which is not participable, gained by learn ing thus —"Wealth gained through science which was acquired from a stranger while receiving a foreign maintenance is termed acquisition through learning" and he contended that inasmuch as the plaintiff Ganesh Dat did not acquire his knowledge of astrology from a stranger while receiving a foreign maintenance, but from his father, his earnings as an astrologer could not be regarded as acquired without detriment to his father's estate He also contended that the learning which the plaintiff received from his father had a money value, and that this fact must be taken into account We are not prepared to hold that the defini tion of 'wealth which is not participable" given by Katyayana is exhaustive It appears to us to be illustrative merely Mr Ghose in his work on the principles of Hindu law, dealing with the rules laid down by Manu, Narada, Vishnu, Katyayana and Yajnavalkya also mentions the definition of Katyayana and passes this comment upon it —"He defined gains of science 'as what is gained by one educated whilst supported by a stranger' He probably meant to emphasize the rule of Narada, but he says nothing about it He only says that in the case of a

with all deference to our learned brother, that no weight can be attached to this distinction The language of the preamble clearly is not complete To render it complete it appears to us to be absolutely necessary to incorporate into it some such words as "the provisions," or ' the clauses," or "conditions following," words which occur in wajib-ul-arzes of the same district which have received judicial interpretation That was clearly, we think, the intention of the parties who signed it Again, we do not agree with the learned Judge in the view that the words "*is waste*" before the word "*iqrar*" indicate that the following words refer to the words immediately preceding, namely, to the assessment of revenue For the signatories of the wajib-ul-arz to express an agreement on their part to pay the revenue fixed by the settlement officer and be bound by the settlement would be redundant and unnecessary. The natural meaning of the preamble is that in view of the fact that a new settlement had been framed, the proprietors express in it an agreement to be bound by the provisions of the wajib ul arz generally The words "*is waste*" do not indicate that they were merely binding themselves to pay the Government revenue We cannot distinguish the case before us from the cases to which we have referred, and we think that the decisions in those cases govern the present case We may point out the importance in cases of the kind of uniformity of decision, if such is possible to be attained Nice distinctions, should not, we think, be drawn with the object of differentiating one case in a district from another in the same district As far as is possible a broad rule should be observed, and if possible that broad rule should be applied to all cases which reasonably come within it We think that the courts below and also the learned Judge of this court were wrong in not following the decisions to which we have referred

We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and also the decrees of the lower courts and dismiss the plaintiff's suit with costs in all courts

*Appeal decreed*

On the question as to what are self acquisitions Manu lays down the general rule that "what a brother has acquired by labour or skill without using the patrimony he shall not give up without his assent, for it was gained by his own exertion" (Manu, IX, clauses 206 to 209) In the Mitakshara the following rule is laid down —"Whatever else is acquired by the co parcener himself without detriment to the father's estate, as a present from a friend, or gift at nuptials does not appertain to the heirs" (Chapter I, section 4, clause 118) This rule is explained by Vijnanesvara to mean that the phrase "anything acquired by himself without detriment to the father's estate" must be every where understood, and it is thus connected with each member of the sentence, namely, 'what is obtained from a friend without detriment to the paternal estate, what is received in marriage without waste of the patrimony, what is redeemed of the hereditary estate without expenditure of ancestral property, what is gained by science without use of the father's goods" The learned advocate for the appellant relied upon the definition given by Katyayana of wealth which is not participable, gained by learning, thus —"Wealth gained through science which was acquired from a stranger while receiving a foreign maintenance is termed acquisition through learning," and he contended that inasmuch as the plaintiff Ganesh Dat did not acquire his knowledge of astrology from a stranger while receiving a foreign maintenance, but from his father, his earnings as an astrologer could not be regarded as acquired without detriment to his father's estate He also contended that the learning which the plaintiff received from his father had a money value, and that this fact must be taken into account *We are not prepared to hold* that the definition of "wealth which is not participable" given by Katyayana is exhaustive It appears to us to be illustrative merely Mr Ghose in his work on the principles of Hindu law, dealing with the rules laid down by Manu, Narada, Vishnu, Katyayana and Yajnavalkya, also mentions the definition of Katyayana and passes this comment upon it —'He defined gains of science 'as what is gained by one educated whilst supported by a stranger' He probably meant to emphasize the rule of Narada, but he says nothing about it He only says that in the case of a

Procedure Code of 1882 The next application for execution was made on 28th May, 1908, against the nephews as well as the widow, in respect of properties other than those against which the previous application had been directed on the allegation that these were self-acquired properties of the deceased Raja and in their possession Thereupon, the nephews objected that the dismissal of the previous application operated as *res judicata*, and also that the application was time barred The widow also objected that the application as against her was time barred These objections having prevailed in the lower courts, the decree-holder came in second appeal to the High Court

Babu *Harendra Krishna Mukerji*, for the appellant —

Taking first the case as against the widow, the first application for execution, although it was against the nephews alone would give a fresh start for the period of limitation as against the widow as well, the mere fact that it was made against the wrong person does not hinder the operation of the benefit of article 179 of the Limitation Act, *Gopal* v *Har Prasad* (1) Again, an application for execution against one of the several legal representatives takes effect for the purposes of limitation against them all, *Ramanuj Sewak Singh* v. *Hingu Lal* (2)

The cases of *Balkishen Das* v *Bedmati Koer* (3) and *Hari* v *Narayan* (4) are analogous, they are based upon a similar principle, viz, that a mere technical defect in the application for execution should not operate to deprive the decree holder of the fruit of his decree The first application having been against a portion of the property of the deceased judgement-debtor, it would keep the decree alive against the rest of his property, *Jamnadas* v *Lalitaram* (5) Again, the nephews, besides succeeding to the ancestral property by right of survivorship, have taken possession of the self-acquired property as well Their position with respect to such property is analogous to that of a residuary legatee and not of an executor *de son tort* That being so, they can represent the whole estate in its entirety, and an application against them would keep the decreee alive against the rightful owner, the widow, *Chuni Lal Bose* v *Osmond Beeby* (6)

(1) Weekly Notes 1892 p 241
(2) (1881) I L R 3 All. 517
(3) (1892) I L R 20 Calc, 388
(4) (1887) I L R 12 Bom 427
(5) (1877) I L R 2 Bom 291
(6) (1903) I L R, 30 Calc, 1044

of an ordinary elementary education could not be regarded as the gains of science acquired at the expense of ancestral wealth

In view of the fact that no portion of the joint family property, be it principal or interest, was spent upon the plaintiff's education, and that he lived separate and apart from the family and acquired his skill in astrology by his own unaided efforts, we are of opinion that his earnings cannot properly be regarded as belonging to the joint family. The joint estate suffered no detriment by the education given to the plaintiff by his father, and it would, we think, be unduly extending the rule laid down by Hindu law-givers if we were to hold that the earnings of the plaintiff as an astrologer under the circumstances of this case are partible amongst the members of the family. We think that the view of the court below upon this question is correct and we dismiss the appeal with costs.

*Appeal dismissed.*

---

*Before Mr Justice Richards and Mr. Justice Tudball*

DULARI (PLAINTIFF) v. MUL CHAND AND OTHERS (DEFENDANTS) *

*Act (Local) No II of 1901 (Agra Tenancy Act), section 22—Occupancy holding—Succession—Hindu law*

An occupancy tenant died before the coming into operation of the Agra Tenancy Act leaving two daughters one indigent and the other rich, and was succeeded by the former After the Tenancy Act came into operation the indigent daughter died. *Held* that the rich daughter was entitled to inherit the holding upon the death of her sister in preference to the latter's son, her right, which had accrued on the death of her father, having been merely postponed during the lifetime of the indigent daughter

THE facts of this case were as follows:—

One Thakuri, an occupancy tenant, died twenty-five years before this suit leaving two daughters, named Musammat Shibbo and Musammat Dulari Musammat Shibbo the indigent daughter succeeded according to the Hindu Law. Musammat Shibbo died in 1906 Musammat Dulari, her sister, brought this suit against the defendants, the sons of Musammat Shibbo. The defence was that section 22 of the new Agra Tenancy Act applied. The court of first instance decreed the suit in part The lower appellate

---

* Second Appeal No. [illegible] Muhammad Mubarak

Procedure Code of 1882 The next application for execution was made on 28th May, 1908, against the nephews as well as the widow, in respect of properties other than those against which the previous application had been directed on the allegation that these were self-acquired properties of the deceased Raja and in their possession Thereupon, the nephews objected that the dismissal of the previous application operated as *res judicata*, and also that the application was time barred The widow also objected that the application as against her was time barred These objections having prevailed in the lower courts, the decree-holder came in second appeal to the High Court

Babu *Harendra Krishna Mukerji*, for the appellant —

Taking first the case as against the widow, the first application for execution, although it was against the nephews alone would give a fresh start for the period of limitation as against the widow as well, the mere fact that it was made against the wrong person does not hinder the operation of the benefit of article 179 of the Limitation Act, *Gopal* v *Har Prasad* (1) Again, an application for execution against one of the several legal representatives takes effect for the purposes of limitation against them all, *Ramanuj Sewak Singh* v. *Hingu Lal* (2)

The cases of *Balkishen Das* v *Bedmati Koer* (3) and *Hari* v *Narayan* (4) are analogous, they are based upon a similar principle, viz, that a mere technical defect in the application for execution should not operate to deprive the decree holder of the fruit of his decree The first application having been against a portion of the property of the deceased judgement-debtor, it would keep the decree alive against the rest of his property, *Jamnadas* v *Lalitaram* (5) Again, the nephews, besides succeeding to the ancestral property by right of survivorship, have taken possession of the self acquired property as well Their position with respect to such property is analogous to that of a residuary legatee and not of an executor *de son tort* That being so, they can represent the whole estate in its entirety, and an application against them would keep the decree alive against the rightful owner, the widow, *Chuni Lal Bose* v *Osmond Beeby* (6)

(1) Weekly Notes 1893 p 211
(2) (1881) I L R 3 All. 517
(3) (1893) I L R, 20 Calc, 388
(4) (1887) I L R 12 Bom 427
(5) (1877) I L R 2 Bom 231
(6) (1903) I L R, 30 Calc, 1011

end with her death It has been practically admitted that if the property in question were ordinary zamindari property which had descended to an indigent sister in priority to an affluent one, the estate would devolve on the death of the poor sister on the rich sister in priority to the poor sister's sons It seems to us that Musammat Dulari's rights were acquired on the death of her father, that is to say, prior to the passing of the present Tenancy Act, and that these rights were merely postponed during the lifetime of Musammat Shibbo The present Tenancy Act does not purport in any way to take away the rights which had already been acquired For these reasons we think that both the courts below were wrong, the court of first instance in not giving the plaintiff a decree for the entire holding and the lower appellate court in dismissing the suit altogether We allow the appeal, set aside the decree of the lower appellate court and modify the decree of the court of first instance by awarding the plaintiff a decree for her claim in full The plaintiff will have her costs in all courts

*Appeal decreed*

---

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain*

KESHO RAM SINGH AND ANOTHER (DEFENDANTS) *v* RAM KUAR AND ANOTHER (PLAINTIFFS) *

*Act No I of 1877 (Specific Relief Act) section 42—Suit for declaration of abstract right—Cause of action—Act No VII of 1889—(Succession Certificate Act) section 8*

A Hindu widow applied for a succession certificate to enable her to collect the debts of her deceased husband consisting mainly of a sum of Rs 4 000 odd on fixed deposit with a bank Objections being raised by the next reversioners an order was passed enabling the applicant only to draw the interest accruing due from time to time on this deposit The applicant then brought a suit for a declaration that she was entitled to the whole sum of money *Held* that the suit was maintainable the limitation upon her power to get in the money having been imposed at the instance of the reversioners

THE facts of this case were as follows —

The plaintiff Musammat Ram Kuar, widow of one Ram Bharose Singh, applied to the District Judge of Allahabad, for a succession certificate in order to enable her to realize a sum of Rs 4,000 odd, held in fixed deposit by the Allahabad Bank to

* Second Appeal No 1191 of 1908 from a decree of C Rustomjee, District Judge of Allahabad dated the 25th of May, 1908 confirming a decree of Prag Das Subordinate Judge of Allahabad, dated the 12th of December, 1907.

He died, however, before any application was made to execute the decree. The first application for execution put in by the decree-holder is dated the 19th of April, 1905. The nephews, and the nephews only were arrayed on the record as the legal representatives of the deceased judgement debtor, Raja Suchit Prasad Singh, and the application sought to attach and bring to sale certain immovable property alleged to be the assets of the deceased Raja and in the possession of the nephews. The nephews objected, and on the 8th of July, 1905, the court before which the proceedings were held that as the defence admitted the jointness of the family as consisting of Raja Suchit Prasad Singh and his nephews, but put forward a special custom that Raja Suchit Prasad Singh was the sole owner of the property, and could not prove that custom, the nephews got the property by survivorship, and the decree holder could not proceed against it The application out of which the present appeal arises, was instituted on the 28th May, 1908 It seeks to attach and bring to sale property other than property claimed in the execution proceedings of the 19th of April, 1905. It is said by the decree holder to be the self-acquired property of the deceased now in possession both of the widow and the nephews The widow for her part objected that as against her the decree was time-barred and could not be enforced. The nephews for their part pleaded that the order of the 8th of July, 1905, operated as *res judicata* and the application could not, therefore, be enforced against them. They also raised a plea that the application of the 28th May, 1908, was barred by lapse of time The court before which the applications were filed held that the particular property mentioned in the applications was not the self-acquired property of the deceased. The lower appellate court considered that it was not necessary for the lower court or for it to decide whether the property mentioned in the application for execution was the joint family property or the self acquired property of the deceased. As regards the nephews it held that the present application was barred by the rule of *res judicata*, and as to the widow it held that the application was time-barred The decree-holder comes here in second appeal and contends that the lower court has misunderstood the scope of section 234 of the Code of Civil Procedure

maintainable *Man Kuar* v *Tara Singh* (1), *Shah Muhammad* v *Kashi Das* (2) In the present case the plaintiff was a Hindu widow and as such entitled to enjoy unconditionally the income from the money and was also entitled to dispose of or appropriate the corpus of the fund for legal necessity She had no higher powers than this and the defendants had all along admitted this As there was no denial of her title or right the basis of an action for a declaration was wanting He cited Mayne's Hindu Law 7th edition, section 868 and *Bhagwan Deen* v *Myna Baee* (3) The plaintiff had misconceived her remedy The District Judge had special jurisdiction to make any order under section 8 of the Succession Certificate Act If there was an improper exercise of jurisdiction, the plaintiff should have appealed under section 19 of that Act to the High Court which could have dealt with the matter in the exercise of jurisdiction conferred by the same Act The plaintiff not having appealed and the granting of a declaratory decree being discretionary, the courts below should have refused the plaintiff a declaration

Babu *Damodar Das*, for the respondent, was not called upon

KNOX and KARAMAT HUSAIN, JJ —This second appeal arises out of a suit brought by Musammat Ram Kuar, widow of one Ram Bharose Singh It appears that at the time of his death Ram Bharose Singh had a sum of money in fixed deposit in the Allahabad Bank After his death, his widow applied for a succession certificate enabling her to receive this sum of money Notice was sent to the present defendants, who are admittedly the next reversioners to Ram Bharose Singh They while not disputing the right of the lady, asked for an order protecting their reversionary interests The District Judge at first asked Musammat Ram Kuar to give security, and upon her saying that she was unable to do so, he granted her a certificate under section 8 of the Succession Certificate Act (VII of 1889) enabling her only to receive interest on the deposit Musammat Ram Kuar then brought the present suit asking that her title to this sum in deposit might be declared, that she might be granted a decree entitling her to withdraw the money, and that the order of the

(1) (1886) I L R, 7 All 583 at p 585 (2) (1884) I L R 7 All, 199
(3) (1867) 11 Moo I A 487

and that the execution proceedings taken against them as legal representatives of the deceased for this purpose are bad

There remains the further question as to whether the application as against the widow is or is not barred by limitation The learned vakil for the appellant put forward two grounds on which he argued that the courts below ought to have held that the application against the widow was in time First, he pleaded in aid the execution proceedings of the 19th April, 1905. He contended that, although those proceedings ran in the name of the nephews only, they must be held to keep the decree alive as against the widow, who was a legal representative also In support of his contention he referred to the case of *Ramanuj Sewak Singh* v *Hingu Lal* (1) and also to the case of *Gopal* v *Har Prasad* (2) The case of *Hari* v *Narayan* (3) was also cited, but we hold that this case has no application whatever to the present case In *Ramanuj Sewak Singh* v *Hingu Lal*, the application for execution was against one of the several legal representatives of the deceased judgement-debtor As we hold that the nephews are not the legal representatives of the deceased judgement-debtor, that case is not an authority for the circumstances of the present case In the second case of *Gopal* v *Har Prasad*,
as agains ... note is not happily worded Indeed, we might go further
enforced Th... it is liable to mislead The concluding part of the
of the 8th of July ... that the learned Judges who decided the case
cation could not ... one very important question was left undecided,
also raised a pl... Har Prasad and Kanhiya Lal were the legal
was barred by lapse ... the deceased judgement-debtor It cannot be
cations were filed ... be aded that the application for execution of
the applications ... v br ons alleged to be the legal representatives of
deceased The ... ebt ... ent debtor will not be a bad application for
necessary for the ... ion merely because the persons named therein
property mentione... found not to be the legal representatives of the
joint family property The head-note goes far beyond the judgement
As regards the ... ep... tion was, that on the 16th of February 1906,
barred by the rule of ... rs, Raja Nityanand Prasad Singh, had made a
that the application ... decree and this part payment and a letter
here in second appeal
understood the scope o...

(1) (1904) 3 All 517 (2) Weekly Notes 1891 p 241
(3) (1887) I L R 12 Bom 427

have the houses partitioned and the Munsif thereupon dismissed the suit with costs The plaintiff appealed The only ground considered by the lower appellate court, was whether the Munsif was right or not in dismissing the suit because the plaintiff through her husband, who was also her general attorney, prevented the amin from preparing a plan of the house

"The lower appellate court was of opinion that the court of first instance had no option but to dismiss the suit, and the plaintiff's appeal was dismissed The plaintiff comes here in second appeal

"It is contended that the lower appellate court should have gone into the merits of the case but if the suit was rightly dismissed by the court of first instance the lower appellate court in upholding the decree of the first court was relieved of the necessity of discussing the other grounds of appeal raised by plaintiff The question raised in this appeal is a somewhat novel one and I have not been referred to any authority on the point But where the plaintiff by an act of her agent obstructs an amin deputed by the court to draw up partition proposals and thereby renders it impossible for the court to grant the relief asked for by the plaintiff, I cannot see that there is any other alternative for the court but to dismiss plaintiff's suit I dismiss the appeal with costs"

Mr. *Abdul Majid*, for the appellant

Mr *Muhammad Ishaq Khan*, for the respondents

STANLEY, C J, and BANERJI, J —This appeal arises out of a suit for partition The plaintiff claimed 41 *sihams* out of 96 *sihams* as purchaser from certain persons who are alleged to have been the owners of this share. The court of first instance made a preliminary decree on the 19th of September, 1906, to the effect that the claim of the plaintiff for partition and separate possession of 36 *sihams* out of 96 *sihams* be decreed. The court also gave certain other directions relating to the property. It then appointed a commissioner to effect a partition with a view to a final decree being passed It appears that the husband of the plaintiff resisted the commissioner and objected to his preparing a plan for purposes of partition The commissioner thereupon returned the commission with his report When the case came on for hearing the plaintiff's pleader asked that the commission might be issued again This the court refused to do, and on the 31st of October, 1906, the learned Munsif passed a decree dismissing the suit with costs

From this decree the plaintiff preferred an appeal to the learned District Judge, but the appeal was dismissed. A second appeal to this Court was also dismissed. This appeal has been preferred under the Letters Patent from the judgement of the learned Judge of this Court.

Bachchu now brought this suit to redeem their share on payment of a proportionate sum The defence was that the suit was barred by section 244 of the former Code of Civil Procedure The sale certificate did not mention the mortgagee rights, but the property sold The original court decreed the suit, but the lower appellate court reversing the decree dismissed the suit

The plaintiffs appealed

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants submitted that the widow of Bachchu was only a *pro formâ* defendant in the suit under which the sale took place It was not her business to defend the suit The property sold was the property claimed, i e, the mortgagees' rights, consequently section 244 of the former Code did not apply

Babu *Sital Prasad Ghosh*, for the respondents, submitted that the widow of Bachchu was a party to a suit in which the sale took place The sale certificate clearly transferred the property and not the mere mortgagee rights He contended that section 316 of the former Civil Procedure Code was conclusive between the parties Questions relating to execution, discharge and satisfaction of a decree were to be decided under section 244 of the former Code between the parties to a suit The widow, who was a party, had a remedy under that section As she did not go to the court executing the decree the present suit was barred

The Hon'ble Pandit *Moti Lal Nehru*, in reply, relied on *Kalka Prasad* v *Basant Ram* (1)

RICHARDS and TUDBALL —This appeal arises out of a suit brought for the redemption of certain property mortgaged on the 2nd of June 1866 Four persons mortgaged their property under this document The property now in dispute is the one sixth share which belonged to Bachu Lal Singh The four mortgagors were Raghunandan, Jhumak Singh, Bachu Lal Singh and Padam Nath Saran Singh The mortgagees were Jeo Lal Singh and Subh Dayal Singh The mortgagees transferred their rights to Jhumak Singh and Padam Nath Saran Singh on the 15th of December, 1869 After that Ambika, son of Jhumak Singh, and Padam Nath Saran Singh mortgaged certain property to the defendants No 1 to 11 in this suit including among the mortgaged property

(1) (1901) I L R 23 All 316

Bachchu now brought this suit to redeem their share on payment of a proportionate sum The defence was that the suit was barred by section 244 of the former Code of Civil Procedure The sale certificate did not mention the mortgagee rights, but the property sold The original court decreed the suit, but the lower appellate court reversing the decree dismissed the suit

The plaintiffs appealed

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants, submitted that the widow of Bachchu was only a *pro formâ* defendant in the suit under which the sale took place It was not her business to defend the suit The property sold was the property claimed, i e, the mortgagees' rights, consequently section 244 of the former Code did not apply.

Babu *Sital Prasad Ghosh*, for the respondents, submitted that the widow of Bachchu was a party to a suit in which the sale took place The sale certificate clearly transferred the property and not the mere mortgagee rights He contended that section 316 of the former Civil Procedure Code was conclusive between the parties Questions relating to execution, discharge and satisfaction of a decree were to be decided under section 244 of the former Code between the parties to a suit The widow, who was a party, had a remedy under that section As she did not go to the court executing the decree the present suit was barred.

The Hon'ble Pandit *Moti Lal Nehru*, in reply, relied on *Kalka Prasad* v *Basant Ram* (1)

RICHARDS and TUDBALL —This appeal arises out of a suit brought for the redemption of certain property mortgaged on the 2nd of June 1866 Four persons mortgaged their property under this document The property now in dispute is the one sixth share which belonged to Bachu Lal Singh The four mortgagors were Raghunandan, Jhumak Singh, Bachu Lal Singh and Padam Nath Saran Singh The mortgagees were Jeo Lal Singh and Subh Dayal Singh The mortgagees transferred their rights to Jhumak Singh and Padam Nath Saran Singh on the 15th of December, 1869 After that Ambika, son of Jhumak Singh, and Padam Nath Saran Singh, mortgaged certain property to the defendants Nos 1 to 11 in this suit including among the mortgaged property

(1) (1901) I L R 23 All 346

Registered No 422.

VOL. XXXII,] [PART IX.



# THE INDIAN LAW REPORTS.

## SEPTEMBER 1910.

(Pages 409—461.)

## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD A[illegible]
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL O[illegible]
APPEAL FROM THAT COURT AND FROM THE COURT
OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY

Privy Council ... J. V. WOODMAN, *Middle Temple.*

High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*



ALLAHABAD:

PRINTED BY F. LUKER, SUPERINTENDENT, GOVERNMENT PRESS,
AND PUBLISHED AT THE GOVERNMENT BOOK DEPOT,
UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

Price, Re. 1.

certain property was sold in execution of the decree which had in no way ordered its sale The assignees of the heirs of Bachu Lal Singh have now brought this suit for redemption and the respondents defendants have met them with a plea that the equity of redemption no longer exists in them, the plaintiffs, but in the defendant, it having been extinguished by the auction sale which took place in execution of the decree in 1897 The answer to this plea was that the sale passed no title to the defendants not being warranted by the decree The reply to this was that that was a point which could only have been raised by the plaintiff's predecessor in title under section 244 of the Code of Civil Procedure, 1882, and not having been so raised the plaintiffs are barred from raising it in the present suit The Court of first instance decreed the claim The lower appellate court reversed the decision, holding that section 244 is a bar preventing the plaintiffs from going behind the auction sale of 1897 On appeal to this Court it is urged that section 244 of the Code of Civil Procedure does not apply to the present case and the lower appellate court misconstrued the decrees of the 22nd of February, 1897 We have already dealt with the true interpretation of the decrees in question There remains the question as to section 244 of the Code of Civil Procedure, 1882 In our opinion that section is no bar whatsoever to the relief now claimed by the present plaintiffs The decrees that were passed were not decrees against the widow of Bachu Lal Singh in any way As was held in the case of *Kalka Prasad* v *Basant Ram* (1), section 244 of the Code of Civil Procedure, 1882, pre supposes a decree enforceable by the decree holder against a person between whom and the decree holder the question referred to had arisen It has no application to a question arising between the decree holder and the person against whom there is no decree to be executed The widow of Bachu Lal Singh was purely a formal party in the previous suit No relief was asked against her and no decree whatsoever was passed against her and the property she represented Therefore, under the ruling mentioned above, section 244 of the Code of Civil Procedure, 1882, has no application to the question which arose between her and the decree holder, that is, the question

(1) (1901) I L R., 23 All., 346

# BOOKS AND PUBLICATIONS FOR SALE

BY THE

# SUPERINTENDENT OF GOVERNMENT PRINTING INDIA.

8, HASTINGS STREET CALCUTTA

*All to be published by the Superintendent of Government Printing, India, can be purchased directly or through the following or any other booksellers —*

AGENTS

CALCUTTA —*Thacker Spink & Co*
MADRAS —*Higginbotham & Co*
BOMBAY— { *Thacker & Co, Ld* / *Radhabai Atmaram Sagoo*

NOTICE —*Books required for private use only can be purchased Application sl accompanied by a remittance unless it is wished that the books should be sent by value payal in which case besides the ordinary postage an additional charge will be made for registrat commission*

*Books required for the Public Service should be obtained through Local Governments*

---

☞ *The amounts within parentheses are for packing and postage*

---

## List of Books and Publications for sale which are less than two years old.

---

## LEGISLATIVE DEPARTMENT.

---

These publications may be obtained from the Office of the Superintendent of Government P India No 8 Hastings Street, Calcutta ]

THE PRICES OF THE GENERAL ACTS LOCAL CODES, MERCHANT SHIPPING, DIGEST INDEX TO MENTS AND THE DIGESTS OF INDIAN LAW CASES, 1901 TO 1907 (SEPARATELY AND PER SET VOLUMES) HAVE BEEN CONSIDERABLY REDUCED

THE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPA

---

### I —THE INDIAN STATUTE BOOK

REVISED EDITION

*Super royal 8vo cloth lettered*

### B —GENERAL ACTS

| | | |
|---|---|---|
| General Acts of the Governor General of India in Council, Vol I, from 1834 to 1867, Edition 1909 | Rs 6 | (10 *a*) |
| General Acts of the Governor General in Council Vol II, from 1868 to 1878, Edition 1909 | Rs 7 | (10 *a*) |
| General Acts of the Governor General in Council Vol III, from 1879 to 1886, Edition 1909 | Rs 6 | (9 *a*) |
| General Acts of the Governor General in Council, Vol IV, from 1887 to 1897, Edition 1909 | Rs 6 | (9 *a*) |
| General Acts of the Governor General in Council, Vol V, from 1898 to 1903 Edition 1909 | Rs 6 | (9 *a*) |
| General Acts of the Governor General in Council, Vol VI, from 1904 to 1906, Edition 1909 | Rs 7, | (12 *a*) |

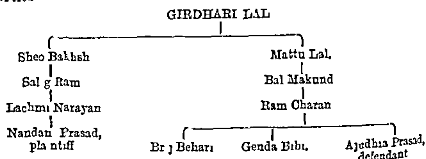
### C —LOCAL CODES

The Bengal Code, Third Edition, 1905, containing the Regulations and Local Acts in force in Bengal Vols I to V Rs 6 a volume or Rs 30 Reduced to Rs 20 for set of 5 Vols

*Vaikuntam Ammangar* v. *Kallapiran Ayyangar* (1) *Sham Charan Mal* v. *Chowdhry Debya Singh* (2) and *Chapple* v. *Cooper* (3) referred to.

THIS was a suit to recover money advanced to a minor member of a Hindu joint family to provide for the marriage of his sister.

The following pedigree will show the relationship of the parties:—




The plaintiff's case was that in 1905 Musammat Genda was more than 13 years of age. She had to be married, and in order to defray the marriage expenses, her brother Brij Behari, who was then an infant, borrowed money and some articles from Salig Ram (plaintiff's grandfather). Brij Behari having died, his minor brother, Ajudhia Prasad, got the family property by right of survivorship. The plaintiff brought the present suit against Ajudhia Prasad for recovery of the moneys advanced with interest. The defence was that Brij Behari was, at the date of the loan, a minor and the contract was void. The court of first instance (Munsif of Cawnpore) decreed the suit, but on appeal that decree was reversed by the Subordinate Judge, who dismissed the suit.

The plaintiff appealed to the High Court.

Dr. *Tej Bahadur Sapru* (with him Pandit *Mohan Lal Nehru*), for the appellant, contended that under the Hindu Law the brother was bound to provide for his sister's marriage. A sister's marriage was a charge on the family property. In fact, the Mitakshara allowed a share to an unmarried sister. Her marriage was a necessity, and if money was borrowed for that necessity it was a charge on the family property. The plaintiff's grandfather helped to discharge a legal obligation, and so he was

(1) (1900) I. L. R. 23 Mad. 512. (2) (1894) I. L. R. 21 Calc. 872.
(3) (1844) 13 M. and W. 252.

| | |
|---|---|
| Act V of 1869 (Indian Articles of War) as modified up to 1st January 1909 | R 1 2 0 (8 a) |
| Act V of 1870 (Unclaimed Deposits) as modified up to 1st October 1908 | 1 a (1 a) |
| Act VII of 1870 (Court Fees) as modified up to 1st February 1909 | Rs 1 2-0 (2 a) |
| Act XXIII of 1871 (Pensions) as modified up to 1st September 1909 | 2 a 3 p (1 a) |
| Act XXVII of 1871 (Criminal Tribes) as modified up to 1st October, 1908 | 5 a 6 p (1 a. 6 p) |
| Act I of 1872 (Evidence) as modified up to 1st May 1908 | Re 1 (2 a.) |
| Act IX of 1872 (Contract) as modified up to 1st February 1908 | Re 1 4 a (2 a.) |
| Act IX of 1874 (European Vagrancy) as modified up to 1st September 1909 | 6 a 6 p (1 a.) |
| Act I of 1878 (Opium) as modified up to 1st October 1907 | 5 a 6 p (1 a) |
| Act VI of 1878 (Treasure Trove) as modified by Act XII of 1891 as reprinted on the 14th February 1908 | 2 a 9 p (1 a.) |
| Act VIII of 1878 (Sea Customs) as modified up to 1st June 1908 | Re 1 6-6 (4 a) |
| Act XI of 1878 (Arms) as modified up to 1st March 1910 | 6 a (1 a) |
| Act XVI of 1879 (Transport of Salt), as modified up to 1st October 190 | 1 a 6 p (1 a) |
| Act XIII of 1880 (Vaccination) as modified up to 1st September 1909 | 4 a 9 p (1 a) |
| Act XV of 1881 (Factories) as modified up to 1st April 1910 | 5 a 6 p (1 a 6 p) |
| Act XVIII of 1881 (Central Provinces Land revenue) as modified up to 1st March 1909 | 1 s 1 2-0 (3 a) |
| Act XXVI of 1881 (Negotiable Instruments) as modified up to 1st September 1909 | 10 a (1 a) |
| Act II of 1882 (Indian Trusts) as modified up to 1st June 1909 | 10 a (1 a) |
| Act XII of 1882 (Salt) as modified up to 1st August 1909 | 7 a (2 a) |
| Act V of 1883 (Indian Merchant Shipping) as modified up to 1st September 1909 | 6 a (1 a) |
| Act IV of 1884 (Explosives) as modified up to 1st September 1908 | 4 a (9 p) (1 a) |
| Act IX of 1884 (Legal Practitioners) as modified up to 30th June 1909 | 1 a 6 p (1 a) |
| Act III of 1888 (Police) as modified up to 1st January 1909 | 1 a 9 p (1 a) |
| Act II of 1889 (Measures of Length) with footnotes | 1 a 3 p (1 a) |
| Act IV of 1889 (Indian Merchandise Marks) as modified up to 1st August 1908 | 6 a (1 a) |
| Act VI of 1889 (Probate and Administration) as modified up to 1st January 1909 | 2 a 9 p (1 a) |
| Act VI of 1890 (Charitable Endowments) as modified up to 1st August 1908 | 2 a 6 p (1 a) |
| Act IX of 1890 (Indian Railways) as modified up to 1st June 1909 | Re 1 2 0 (2 a) |
| Act XI of 1890 (Prevention of Cruelty to Animals) with foot notes | 2 a (1 a) |
| Act XIII of 1890 (Excise Malt Liquors) as modified up to 1st October 1908 | 1 a 6 p (1 a) |
| Act X of 1891 (Indian Penal Code Amendment) as modified up to 1st August 1909 | 1 a (1 a) |
| Act XII of 1895 (Indian Companies Memorandum of Association) as modified up to 1st August 1909 | 2 a (1 a) |
| Act III of 1898 (Lepers) as modified up to 1st September, 1909 | 4 a (1 a) |
| Act V of 1898 (Code of Criminal Procedure) as modified up to 1st August 1909 | Rs 3 10 a (8 a) |
| Act VIII of 1899 (Petroleum) as modified up to 1st January 1909 | 7 a (1 a) |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 | 2 a. 6 p (1 a) |

PIGGOTT, J.—The facts found are as follows —The defendant, Ajudhia Prasad, had an elder brother, Brij Behari Lal and a sister Musammat Genda Bibi The suit is to recover Rs 380 cash, and the value of goods worth Rs 186 7, advanced to Brij Behari Lal for marriage of Musammat Genda It has been found that Brij Behari Lal was in law a minor at the time when the advance was made, and it appears also to be a fact not now contested that the cash and goods so advanced were duly applied to the reasonable and necessary expenses of the marriage Brij Behari Lal is dead, and the plaintiff seeks to recover the loan from the family property in the hands of Ajudhia Prasad We were referred on behalf of the plaintiff appellant to the cases of *Vaikuntam Ammangar* v *Kallapiran Ayyangar* (1) and another between the same parties reported in I L R, 26 Mad, p 497 Here a person legally responsible for the provision of necessary funds for the marriage of a Hindu girl, had refused to make the necessary provision, the marriage was performed with the aid of money borrowed for the purpose by the girl's mother It was held that the latter was entitled to succeed in a suit for the recovery of the money thus expended It may be conceded that by general principles of *Hindu Law* both Brij Behari Lal and the defendant, Ajudhia Prasad, lay under an obligation to provide out of the family property the funds necessary for performing the marriage ceremonies of their sister in a manner suitable to the social position of the family and its pecuniary resources, but the distinction between the present case and those above referred to is obvious The decision in the Madras case turned upon the principle recognised by section 69 of the Indian Contract Act, and the fact that the mother was a person interested in the performance of the girl's marriage In the case now before us the plaintiff lent the minor, Brij Behari Lal money for a certain purpose, but he neither performed the marriage ceremony himself nor was he a person interested in the performance of the same He can succeed, if at all, only in virtue of the provisions of section 68 of the Indian Contract Act I have referred to the notes on the said section in Cunningham and Shephard's edition of the Act, at pages 219 and

(1) (1900) I. L. R., 23 Mad, 512

| | | |
|---|---|---|
| Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908 | In Urdu | 6 p (1 a) |
| Ditto ditto | In Nagri | 9 p (1 a) |
| Act XII of 1896 (Excise), as modified up to 1st March, 1907 | In Urdu | 2 a 9 p. (2 a) |
| Ditto ditto | In Nagri | 3 a 3 p (2 a) |
| Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February, 1906 | In Urdu | 9 p. (1 a) |
| Ditto ditto | In Nagri. | 9 p. (1 a) |
| Act I of 1906 [Indian Tariff (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act III of 1906 (Coinage) | In Urdu. | 9 p (1 a) |
| Ditto ditto | In Nagri. | 9 p (1 a) |
| Act V of 1906 (Stamp Amendment) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p. (1 a) |
| Act III of 1907 (Provincial Insolvency) | In Urdu | 1 a 6 p. (1 a) |
| Ditto | In Nagri | 1 a 6 p (1 a) |
| Act IV of 1907 [Repealing and Amending (Rates and Cesses)) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act V of 1907 (Local Authorities Loan) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p. (1 a) |
| Act VI of 1907 (Prevention of Seditious Meetings) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act I of 1908 (Legal Practitioners) | In Urdu | 3 p. (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act II of 1908 (Tariff) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act III of 1908 [Indian Trusts Amendment] | In Urdu | 3 p (1 a) |
| Act V of 1908 (Code of Civil Procedure) | In Urdu | Rs 1-2 (6 a) |
| Ditto ditto | In Nagri | Rs 1 2 (6 a) |
| Act VI of 1908 (Explosives Substances) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VII of 1908 (Incitements to Offences) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p, (1 a) |
| Act IX of 1908 (Limitation) | In Urdu | 2 a (1 a) |
| Ditto ditto | In Nagri | 2 a (1 a) |
| Act X of 1908 (Salt Duties) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act XI of 1908 (Assam Labour and Emigration) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (2 a) |
| Act XIV of 1908 [Indian Criminal Law (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act XVI of 1908 (Indian Registration) | In Urdu | 2 a. (2 a) |
| Ditto ditto | In Nagri | 2 a (2 a) |
| Act XVII of 1908 (Indian Emigration) | In Urdu | 2 a 3 p (2 a) |
| Ditto ditto | In Nagri | 2 a 3 p (2 a) |
| [Act I of 1909 (Indian Steamship Law Amendment)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act IV of 1909 (Whipping) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act V of 1909 [Amending (Army Act)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VII of 1909 (Anand Marriage) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p |

"necessaries" to the position of minors who are members of a Hindu joint family, particularly in a case like the present, when it so happened that the family contained no member who had attained legal majority I think that in all the English cases one essential element in the transaction is that there should be a certain *urgency* about the minor's need It is not enough that he should benefit by the advance made to him, or that the expenditure should be for purposes entirely proper and reasonable, it must be for some purpose the accomplishment of which could not well be postponed without irremediable detriment to the minor himself or to some person whom he was legally bound to support The same principle underlies those Indian cases, as for instance, *Sham Charan Mal* v *Chowdhry Debya* (1) in which money advanced to meet legal expenses where the liberty or estate of the minor was in jeopardy has been held to be recoverable Looked at from this point of view the age of the girl, Musammat Genda Bibi, becomes the decisive factor in the case I am prepared to hold without serious hesitation that in the case of a family of the caste to which the parties to the present case belong and one holding their position in society, the marriage of a girl of thirteen could not be much longer postponed without serious detriment to her at any rate It could scarcely have been postponed another couple of years to allow of Brij Behari Lal's attaining majority For Musammat Genda Bibi herself, therefore, it seems clear that the reasonable expenses of her marriage were, at the time when the money was advanced, a "necessary" If the lender had taken advantage of his position as a relative (for though only distantly related to Brij Behari Lal he was descended from the same common ancestor), to perform the marriage ceremonies at his own expense, it seems clear to me that he would have been entitled to recover money thus spent from the estate of the minor brothers, who were legally liable to provide it I am not prepared to hold that any satisfactory distinction can be based upon the mere fact that the necessary cash and other goods were handed over to Brij Behari Lal and the management of the business left in his hands Moreover,

(1) (1894) I L. R 21 Calc 872

## NOTICE TO SUBSCRIBERS.

IN order that an opportunity may be afforded of in... cause of the non-delivery of any Part or Parts of the "I... Reports, Allahabad Series," to subscribers, it has been fo... to give notice that no complaint can be attended to regard... any Part or Parts unless information be forwarded to the S... ent, Government Press, Allahabad, within three months a... of publication : after that date back numbers can be supplied ... prepayment and not at the reduced rate of Re. 0-5-9 per copy.

advanced by Salig Ram amounted to a simple loan to Brij Behari and that inasmuch as Brij Behari was a minor at the time of the loan the transaction was void *ab initio* and not enforceable

It is admitted that both Brij Behari and Ajudhia Prasad were, according to the Hindu law, under a legal obligation to provide for the marriage expenses of their sister The money was really advanced to both brothers through the elder brother to enable them to discharge a legal liability It is clear on the authorities that the reasonable expenses of a sister's marriage are chargeable on the family property in the hands of brothers in the same way as the cost of her maintenance [See West and Buhler, 754, Mayne's Hindu Law, 6th edition p 450, and *Tulsha* v *Gopal Rai* (1)] The right to such maintenance and expenses does not rest on contract The liability is created by Hindu law and arises out of the jural relation of the members of the Hindu family In *Vaikuntam Ammangar* v *Kallapiran Ayyangar* (2) it was held that where an uncle had improperly refused to perform the marriage ceremony of his niece, the daughter of his undivided brother, deceased, the widow of the latter having borrowed money for the purpose and performed the ceremony, was entitled to recover the amount expended on the marriage from the uncle It seems to me that according to Hindu law Salig Ram, having made the advances whether they were made to his cousin, Brij Behari and Ajudhia Prasad, who were under a legal obligation to bear the expenses of their sister's marriage, or to Brij Behari as managing member or head of the family, his legal representative is now entitled to recover the advances so made out of the family property in the hands of the defendant It is not suggested, I may add, that the expenses of the marriage were other than reasonable

From another point of view also it seems to me that the plaintiff appellant is entitled to succeed in his appeal Under section 68 of the Indian Contract Act if a person incapable of entering into a contract or any one whom he is legally bound to support, is supplied by another person with necessaries

(1) (1884) I L R 6 All 632 (2) (1900) I L R 23 Mad 512

# TABLE OF CASES REPORTED

contract for the nursing of his lawful child, this contract is good and shall not be avoided by infancy and no more than if he had contracted for his own aliments or education." Lord Bacon treated a contract for necessaries to an infant's wife and lawful children as an illustration of the maxim *persona conjuncta æquiparatur interesse proprio* : Alderson, B., in his judgement, points out that decent Christian burial was a part of a man's own rights and might be classed as a personal advantage and reasonably necessary to him, and then he draws the conclusion that if this be so, the decent Christian burial of a man's wife and lawful children who are *personæ conjunctæ* with him, is also a personal advantage and reasonably necessary to him and the rule of law applies that he may make a binding contract for it. According to Lord Bacon "the Law hath s[illegible] much respect for nature and conjunction of blood that in di[illegible]e cases it compares and matches nearness of blood with co[illegible]jural tion of profit and interest and in some cases allows of [illegible]ntam strongly." The same principle is recognised by Hindu [illegible]here marked feature of the law governing the joint Hindu [illegible]age is the respect and consideration shown to female mem[illegible], the family. The head of the family is bound to supply m[illegible]for ance and marriage expenses for the daughters of the fam[illegible] to money advanced to him for such an object may reaso[illegible]cle I think, be regarded as money supplied for necessaries [illegible]ng the meaning of section 68. From either point of view, [illegible], fore, from which the question before us may be regarde[illegible]al defendant is, in my opinion, liable to discharge the debt [illegible]or tracted for the marriage expenses of his sister I would, [illegible]s fore, allow the appeal, set aside the decree of the lower a[illegible]n late court and restore the decree of the court of first in[illegible] with costs in all courts

BANERJI, J.—I agree with the learned Chief Ju[illegible] and have nothing to add

BY THE COURT:—The order of the Court is that the appeal be allowed, the decree of the lower appellate court set aside and the decree of the court of first instance restored with costs in all courts

*Appeal decreed.*

# TABLE OF CASES CITED.

the other could not. A petitioner for a certificate could apply for his share of the debt only, and if he could apply for so much as would come into his hands why should not he apply for a part only of the sum that he could legitimately claim ? The two cases referred to are authority for the contention that a part of a debt could be claimed. The reason for disallowing an application for part of a debt was based on a desire for limitation of actions But the case was different where a person claimed a portion of his share of the debt and abandoned the rest—it was not that he postponed the claim for the recovery of the balance

There was in this case a single contract originally, but by operation of the Muhummadan law a wife's dower became divisible among her heirs.

Maulvi *Muhammad Ishaq*, for the opposite party, was not called upon to reply.

KNOX and KARAMAT HUSAIN, JJ —This application for revision is an application by a lady, who as mother-in-law of a Muhammadan gentleman sets forth that she is entitled to Rs 17,000 out of a debt amounting to Rs 51,000 due by that gentleman to his wife Coming to the court the lady says that she gives up her claim to the whole of the 17,000 rupees with the exception of Rs 800 on the ground that she has no hope of receiving more than Rs 800 from the estate of the lady to whom the dower debt is due. The lower appellate court refused to grant her the certificate that she asked for under section 7 of Act VII of 1889, and in support of its refusal refers in its judgment to the case of *Akbar Khan v. Bilkisara Begam* (1). The learned Judges who decided the last named case held that they were bound to follow the ruling laid down in *Muhammad Ali Khan v. Puttan Bibi* (2). In that case a Muhammadan lady, who was entitled to something more than eleven lakhs of rupees as her dower, died, and the father of the deceased lady brought a suit against the husband of the deceased lady to recover the share which he took by inheritance in the dower debt. He applied for a certificate entitling him to collect debts, not to the amount of eleven lakhs of rupees, but to the amount of one lakh fifty thousand rupees,

(1) Weekly Notes, 1901, p. 125. (2) (1898) I. L. R., 19 All., 129.

# INDEX.

his half-brother. Probate was, however, granted. Het Singh then brought the present suit for cancellation of the will. His claim was decreed by the additional Subordinate Judge of Aligarh The defendants thereupon appealed to the High Court.

Babu *Girdhari Lal Agarwala*, for the appellants, cited *Bhupati Nath Smrititirtha* v. *Ram Lal Moitra* (1).

Pandit *Mohan Lal Sandal*, for the respondent, cited Ghose's Hindu Law, pages 757 and 759, *Nogendra Nandini Dassi* v. *Benoy Krishna Deb* (2) and *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (3).

RICHARDS and TUDBALL, JJ.—The facts out of which this appeal arises are very simple. One Umrao Singh made a will to the following effect:—

"I have attained the age of 60 years, but I am childless I am in a sound state of body and mind. The temple which I am building is only half built. It is my intention to instal an idol of Sri Radha Kishanji in it I have despaired of my life, and hence I will that the zamindari property in *patti* Kamal, holding No 5, mauza Kukurgaon, pargana Sadabad, be devoted to the completion of the temple and to *rag bhog* and other expenses Musammat Sobha Kunwar and Gian Kunwar, my wives, and Mohar Singh and Girwar Singh, whom I have brought up from infancy, shall be the superintendents. And the remainder of my property which is in mauza Kukurgaon, Gari, Avram, pargana Sadabad, district Muttra, and Chandpur hamlet of Gopi, pargana Akrabad, district Aligarh, shall, after the death of the Musammats, be applied in defraying the *rag bhog* and other expenses of Sri Thakurji Maharaj Mohar Singh and Girwar Singh shall be the superintendents of this temple and they shall be at liberty either to do the management themselves or get it done by others. The entire property shall stand in the name of Sri Thakur Radha Kishanji Maharaj and the superintendents shall have no power to sell or mortgage it. Mohar Singh shall realize the outstanding debts due to me and therefrom pay my creditors The balance he shall spend on the temple. If the above mentioned persons do any thing against the temple, one or two or all of them shall be removed from their office. Bohre Sri Ram, resident of Jaunpur, Thakur Anand Singh, resident of Bhakulara, and Lala Radha Raman, resident of kasba Adin, shall have power either unanimously or by majority of votes to replace the said superintendents by others As regards my three houses, the one in which the Musammats live shall continue to be occupied by them till their death, when it shall devolve upon Mohar Singh and Girwar Singh. The second house, whose entrance is towards the west, shall be occupied by Mohar Singh, &c."

The appellants applied for probate of this will. This application was opposed by the widows of the testator as also by Het

(1) (1909) 14 C W. N., 18 (2) (1902) I L. R., 30 Calc., 521.
(3) (1901) I. L. R., 29 Calc., 260.

# APPELLATE CIVIL

*Before Mr Justice Sir George Knox and Mr Justice Piggott*

RAJ NARAIN RAI (PLAINTIFF) v DUNIA PANDE AND OTHERS (DEFENDANTS) *

*Pre emption—Suit instituted after decrees in favour of other pre emptors—Plaintiff no party to former suits—Suit maintainable*

*Held* that where a pre-emptor having a superior right of pre emption brings his suit within limitation the fact that decrees have been made in favour of other pre emptors the plaintiff not being a party to the suits in which such decrees were passed, will be no obstacle to the success of the suit

*Abdur Razzaq* v *Mumtaz Husain* (1) distinguished *Serh Mal* v *Hukm Singh* (2), *Allahdad Khan* v *Abdul Hakim* (3) and *Muhammad Latif* v *Gobind Singh* (4) referred to

THE facts of this case were as follows —

The property in suit originally belonged to Baldeo Pande and Ram Lochan Pande, who sold it on the 20th of December, 1906, to Musammat Murti and others One Dunia Pande brought a suit to pre empt the property in the court of the Subordinate Judge of Ghazipur That court gave the plaintiff a decree on the 29th November, 1907, to pre empt 1/14 of the property only on payment of 1/14 of the purchase money

Mahadeo Rai and others instituted another suit to pre empt the same property on the 29th of October, 1907, in the court of the Munsif On the 14th of December, 1907, this plaint was returned by the Munsif for presentation to the court of the Subordinate Judge, which was done on the 16th, and on the 23rd of December, 1907, these plaintiffs got a decree for 13/14 of the property

On the 17th of December, 1907, Raj Narain Rai, appellant in this second appeal, brought a suit in the court of the Munsif to pre empt the same property The suit was decreed, as it was found that he had preferential rights over Dunia Pande and Mahadeo Rai and others, and he was no party to the first two suits The defendants, Dunia Pande and others, appealed to

*Second Appeal No 993 of 1908 from a decree of Sri Lal District Judge of Ghazipur dated the 25th of July 1908 reversing a decree of Preonath Ghose Officiating Munsif of Muhammadabad dated the 7th of April 1908

(1) (1903) I L R, 25 All 334
(2) (1897) I L R, 20 All, 100
(3) S A No 7-1 of 1906 decided April 12th, 1907
(4) (1883) I L R 5 All 382

PAGE.

*"Kharch-i-pandan"—"Pin-money"—Right to sue of person not party to agreement—Agreement on behalf of minor—Refusal to live with husband—Unconditional agreement to pay allowance.*] In accordance with an arrangement made between the defendant and the father of the plaintiff (then a minor) on the occasion and in consideration of her marriage with the defendant's son (also a minor), the defendant executed a document whereby he agreed to "continue to pay the sum of Rs. 500 a month in perpetuity" to the plaintiff for her "pandan (betel nut) expenses" &c "from the date of the marriage, i e, from the date of her reception," and made the payment of the allowance a charge on certain immoveable property specified in the agreement. The plaintiff's reception into her husband's house took place in 1883 The husband and wife lived together till 1896, when owing to differences she left her husband's home and resided elsewhere, when the defendant stopped the payments In a suit to recover arrears of the allowance: *Held* (affirming the decision of the High Court) that the plaintiff, though not a party to the agreement, was entitled in equity to enforce her claim.

*Tweddle v Atkinson*, 1 B & S 393, distinguished as being an

under it.

In India and amongst communities circumstanced as were Muhammadans, among whom marriages were contracted for minors by parents and guardians, serious injustice might be occasioned if the common law doctrine were applied to agreements or arrangements entered into in connexion with such contracts.

*Held* also that the allowance for 'kharch-i-pandan," though having some analogy in its nature to the English "pin-money," stood on a different legal footing arising from difference in social institutions. It was a personal allowance to the wife, over the
l little or no control, nor were
s the case with "pin-money"
greement here the payment of
under the circumstances the
fact that the plaintiff had left her husband's house and refused to live with him did not bar her from recovering it.

Khwaja Muhammad Khan *v* Husaini Begam, I. L R, 32 All. .. 410

Muhammadabad It was expressly pleaded that the sale consideration specified in the sale deed of December 20th, 1906, was fictitious, the correct amount being estimated at Rs 400 only The defendants Nos 6 to 19 were impleaded as rival pre emptors, but the plaintiff stated his cause of action as having arisen on December 20th, 1906, and also on November 29th, 1907, the date of the decree in favour of Dunia Pande The present plaintiff was not a party to either of the previous suits The learned Munsif held that in view of the plea regarding the actual amount of the consideration, he had jurisdiction to entertain the suit, he found that the present plaintiff had, under the terms of the wajib ul arz a superior pre emption right to any of the defendants Nos 6 to 19 He held that the plaintiff's right could not be affected by the result of either of the previous suits, to which he was not a party Finally he found the actual sale consideration to have been Rs 800, and he gave the plaintiff a decree accordingly The defendants Nos 7 to 19 submitted to this decree, but separate appeals were filed in the court of the District Judge of Ghazipur by the defendants vendees and by the rival pre emptor Dina (or Dunia), defendant No 6 The learned District Judge held that no decree for pre emption could be passed in favour of the present plaintiff after the dates of the two decrees in favour of the two rival sets of pre emptors He accordingly, without deciding any of the other points in issue, accepted the appeals and dismissed the plaintiff's suit The latter comes to this Court in second appeal, and is virtually opposed by the defendant No 6 (Dunia) only The defendants Nos 7 to 19 and the defendants vendors have not appeared at all in this Court, while the defendants vendees appeared only to plead that they ought to be exempted from all costs.

The decision of the learned District Judge rests entirely on the ruling of this Court in *Abdul Razzak* v *Mumtaz Husain and others* (1) Now in that case it is clear that what the learned Judges of this Court held to be the "insuperable difficulty in the way of the plaintiff" was that he had been a party to the previous suit for pre emption, and might have sought his remedy by way of appeal from the previous decree It is true they went on to add that they could find no authority for the proposition that a right

(1) (1903) I L R, 25 All, 334

and that the execution proceedings taken against them as legal representatives of the deceased for this purpose are bad.

There remains the further question as to whether the application as against the widow was or was not barred by limitation. The learned vakil for the appellant put forward two grounds on which he argued that the courts below ought to have held that the application against the widow was in time. First, he pleaded in aid the execution proceedings of the 19th April, 1907. He contended that, although those proceedings ran in the name of the nephews only, they must be held to keep the decree alive as against the widow, who was a legal representative also. In support of his contention he referred to the case of *Ramanuj Sewak Singh* v. *Hingu Lal* (1) and also to the case of *Gopal* v. *Har Prasad* (2). The case of *Hari* v. *Narayan* (3) was also cited, but we hold that this case has no application whatever to the present case. In *Ramanuj Sewak Singh* v. *Hingu Lal*, the application for execution was against one of the several legal representatives of the deceased judgement-debtor. As we hold that the nephews are not the legal representatives of the deceased judgement-debtor, that case is not an authority for the circumstances of the present case. In the second case of *Gopal* v. *Har Prasad*, the head note is not happily worded. Indeed, we might go further and say that it is liable to mislead. The concluding part of the judgement shows that the learned Judges who decided the case considered that one very important question was left undecided, namely, whether Har Prasad and Kanahya Lal were the legal representatives of the deceased judgement-debtor. It cannot be said to have been decided that the application for execution of a decree against persons alleged to be the legal representatives of the original judgement debtor will not be a bad application for purposes of limitation merely because the persons named therein are subsequently found not to be the legal representatives of the judgement-debtor. The head-note goes far beyond the judgement. The second contention was, that on the 16th of February 1906, one of the nephews, Raja Nityanand Prasad Singh, had made a part payment of the decree and this part payment and a letter

(1) (1881) I. L. R. 3 All. 517. (2) Weekly Notes 1892 p. 241.
(3) (1887) I. L. R., 12 Bom., 427.

similar to the present was allowed to succeed. The actual decision as reported is upon a different point, but the fact that a pre emption decree in virtue of which certain persons had stepped into the places of the original vendees would not bar a subsequent suit for pre emption on the original sale was taken for granted It was strongly urged upon us in argument on behalf of Dunia Pande that the plaintiff had no cause of action against this defendant except upon the latter decree of November 29th, 1907. In any case this argument does not apply to the defendants Nos 7 to 19 who had not obtained any decree at all at the time when the present suit was filed. The way in which these defendants got their suit in the court of the Subordinate Judge rushed throug is certainly peculiar and suggestive of collusion, and, as we have already pointed out, they have submitted to the decree of the Munsif's court in the present case and have put in no appearance in this Court. The answer, however, to the argument on behalf of the defendant respondent Dunia, seems to lie in the (or Dunia), he was really impleaded along with defendants no decree simply as a rival pre emptor. The plaintiff had a c t plaintiff as against all the defendants Nos. 6 to 19 from the rival sets they formally set up their respective claims to pre-em ny of the ing the sale-deed of December 20th, 1906, by filing the plain-effect The point may not have been taken with s peal, and is ness in the plaint, but this can hardly be said to aff only. The tiff's right to succeed. have not

We, therefore, accept these appeals, set aside th es appear-the lower appellate court, and remand the suit to t l costs. disposal under the provisions of order XLI, rule 23 ntirely on Procedure Code of 1908 As regards costs, we think again and order that Dunia (or Dina) shall pay the costs of th learned appellant in this Court, and that the defendants v ity in the their own costs. previous

*Appeal decreed and caus* by way of

footing arising from difference in soc al institutions It was a personal allowance to the wife, over the application of which the husband had l ttle or no control, nor were there obligations attached to it as was the case with "p n money" in England On the terms of the agreement here the payment of the allowance was unconditional and under the circumstances the fact that the plaintiff had left her husband s house and refused to live with him did not bar her from recovering it

APPEAL from a judgement and decree (27th November 1906) of the High Court at Allahabad, which reversed a decree (16th August 1904) of the Subordinate Judge of Agra, and decreed the respondent's suit

The suit was brought against the appellant for the recovery of Rs 15,000 due to the plaintiff as arrears of an allowance under an agreement executed in her favour by the defendant on the 25th October 1877 in contemplation and consideration of the plaintiff's marriage with the defendant's son both the plaintiff and her future husband being minors at the time of its execution

The facts of the case are fully stated in the report of the case in the High Court (SIR JOHN STANLEY, C J and SIR WILLIAM BURKITT, J) which will be found in I L R, 29 All, 151.

On this appeal—

*Cave, K C*, and *Ross* for the appellant contended that the respondent could not sue upon the agreement as she was not a party to it and was a minor when it was executed Reference was made to *Tweddle* v *Atkinson* (1) [Lord MACNAGHTEN Here a charge upon immovable property has been by the agreement created in the respondent's favour, why cannot she sue?] Not being a party to it she is not entitled to enforce it, or to take advantage of its provis ons

At any rate the allowance was not recoverable after the *date she ceased to live with her husband The money was given* to her for her expenses to enable her to support her position as a wife, and having deliberately left her husband and refused to go back to him, she was no longer entitled to the allowance Reference was made to Sir Roland Wilson's Anglo Mahomedan Law (3rd edition, 1908) pages 123, 125 and 133, *Donovan* v *Needham* (2), *Howard* v *Digby* (3) and Wilson's Glossary, 393, as to the meaning of "pandan"

(1) (1861) 1 B and S 393 (2) (1846) 9 Beavan, 164
(3) (1834) 2 Cl & Fin, 634 (663)

# DISTRICT

# GAZETTEERS,

## UNITED PROVINCES.

---

*The undermentioned Gazetteers of Districts in the United Provinces recently been published by the Government Press, and are available for sale the public at the Government Book Depot, Allahabad. The prices quoted incl packing and postage charges :—*

| | Rs. | a. | p. |
|---|---|---|---|
| Bulandshahr .. | 3 | 6 | 0 |
| Bahraich .. | 2 | 14 | 0 |
| Sultanpur ... | 2 | 14 | 0 |
| Unao ... | 3 | 6 | 0 |
| Hardoi ... | 3 | 6 | 0 |
| Bara Banki .. | 3 | 6 | 0 |
| Sitapur ... | 2 | 14 | 0 |
| Kheri ... | 2 | 14 | 0 |
| Meerut ... | 3 | 6 | 0 |
| Lucknow ... | 3 | 6 | 0 |
| Ballia ... | 3 | 6 | 0 |
| Muzaffarnagar .. | 3 | 6 | 0 |
| Naini Tal . | 3 | 6 | 0 |
| Rae Bareli . | 2 | 14 | 0 |
| Partabgarh ... | 2 | 14 | 0 |

| | Rs. | a. | p. |
|---|---|---|---|
| Fyzabad ... | 3 | 6 | 0 |
| Gonda . | 3 | 6 | 0 |
| Agra .. | 3 | 6 | 0 |
| Fatehpur ... | 3 | 6 | 0 |
| Basti ... | 3 | 6 | 0 |
| Budaun ... | 3 | 6 | 0 |
| Bijnor ... | 3 | 6 | 0 |
| Jaunpur ... | 4 | 6 | 0 |
| Benares ... | 4 | 6 | 0 |
| Ghazipur ... | 3 | 6 | 0 |
| Pilibhit ... | 2 | 14 | 0 |
| Banda ... | 3 | 6 | 0 |
| Saharanpur ... | 3 | 6 | 0 |
| Cawnpore ... | 4 | 6 | 0 |

*Apply to the SUPERINTENDENT,*

*Government Press, Allah*

the allegation of unchastity was established or it was not, if the evidence was not sufficient or not reliable, there was an end of the charge so far as the particular matter in issue was concerned, and it was hardly proper to give expression to what the Judge calls "suspicion"

The Subordinate Judge, however, came to the conclusion that the plaintiff's refusal to live with her husband was satisfactorily proved, and holding that on that ground she was not entitled to the allowance, he dismissed the suit

The plaintiff thereupon appealed to the High Court, where the argument seems to have been confined solely to the question of the plaintiff's right to maintain the action, as the learned Judges observe that neither side called their attention to the evidence on the record They held that she had a clear right to sue under the agreement and they accordingly reversed the order of the first court and decreed the plaintiff's claim

The defendant has appealed to His Majesty in Council, and two main objections have been urged on his behalf to the judgement and decree of the High Court

First, it is contended, on the authority of *Tweddle* v *Atkinson* (1) that as the plaintiff was no party to the agreement, [illegible] ot take advantage of its provisions With refer[illegible] s it is enough to say that the case relied upon [illegible] n of assumpsit, and that the rule of common law on which it was dismissed is not, in their Lordship's [illegible] pplicable to the facts and circumstances of the present [illegible] re the agreement executed by the defendant specifically [illegible] immovable property for the allowance which he binds [illegible] to pay to the plaintiff, she is the only person beneficially [illegible] d under it In their Lordships' judgement, although no [illegible] y to the document, she is clearly entitled to proceed in equity [illegible] nforce her claim

Their Lordships desire to observe that in India and among [illegible] mmunities circumstanced as the [illegible] marriages are contracted [illegible] might [illegible]

| | |
|---|---|
| The Bombay Code Vol I, Third Edition 1907 .. .. | Rs 4 (8 a) |
| Ditto Vol II, Third Edition 1907 ... . | Rs 6 (8 a) |
| Ditto Vol III, Third Edition, 1908 . | Rs 5 (8 a) |
| Ditto Vol IV, Third Edition, 1909 ... .. | Rs 4 (8 a) |
| Volumes I to IV Reduced to Rs 11 per set | |
| The Coorg Code Third Edition 1908 ... ... | Rs 2 (4 a) |
| E B & Assam Code Vol I, Edition 1907 . | Rs 6 (10 a.) |
| Ditto Vol II Edition 1907 | Rs 6 (9 a) |
| Ditto Vol III Edition 1907 . | Rs 6 (9 a.) |
| Volumes I to III reduced to Rs 16 per set | |
| The United Provinces Code Vol I Fourth Edition 1906 consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table | Rs 5 (8 a) |
| The United Provinces Code Vol II, Fourth Edition, 1906 consisting of the Acts of the Lieutenant Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in or extended to the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act 1874 with an Index Rs 10 (Re 1) for both Vols or Rs 5 (8a) for each Volume | |
| The United Provinces Code Vols I and II reduced to Rs 7 per set | |

*In the Press*

A new edition of the Burma Code

## II—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION

| | |
|---|---|
| Act I of 1846 (Legal Practitioners) as modified up to 1st October, 1907 ... .. | 2 a (1 a.) |
| Act XXI of 1850 (Removal of Caste Disabilities) with foot notes | 1 a 6 p (1 a) |
| Act XXXVII of 1850 (Public Servants Inquiries) as modified up to 1st August 1908 | 11 a (1 a.) |
| Act XXX of 1852 (Naturalization of Aliens), as modified up to 30th April 1908 .. | 2 a. (1 a) |
| Act XX of 1853 (Legal Practitioners) as modified up to 1st September 1907 .. | 1 a 9 p (1 a) |
| Act XXIV of 1854 (Malabar War—Knives) with foot notes | 1 a 8 p (1 a) |
| Act XXIII of 1855 (Administration of mortgaged Estates) as modified up to 1st October 1908 | 1 a 8 p (1 a.) |
| Act XXIV of 1855 (Penal Servitude) as modified up to 1st January, 1909 | 2 a (1 a) |
| Act XIII of 1857 (Opium) as modified up to 1st August 1908 | 4 a 8 p (1 a) |
| Act XXVII of 1857 (Madras University) with foot notes .. | 2 a 9 p (1 a.) |
| Act IX of 1859 (Forfeiture) as modified up to 1st October 1908 ... | 1 a 9 p (1 a) |
| Act XXIV of 1859 (Madras District Police) as modified up to 1st November 1907 ... .. | 3 a 6 p (2 a) |
| Act XVI of 1863 (Excise Duty on Spirits) as modified up to 1st October 1908 | 2 a (1 a.) |
| Act XXXI of 1863 (Gazette of India) with footnotes | 1 a 3 p (1 a) |
| Act XV of 1864 (Indian Tolls) as modified up to 30th June 1909 | 1 a 9 p (1 a) |
| Act X of 1865 (Succession) as modified up to 1st April 1909 | Rs 1 8 (2 a.) |
| Act XXII of 1867 (Serais and Paraos) as modified up to 1st August 1908 .. .. | 2 a (1 a.) |
| Act XXV of 1867 (Press and Registration of Books) as modified up to 1st October 1907 .. .. | 6 a (1 a) |

ther reservation was made at the time is obvious The aff was closely related to the ruler of the native state mpur; and the defendant executed the agreement in order ke a suitable provision for a lady of her position. The gency that has since arisen could not have been contem- by the defendant

1910

KHWAJA MUHAMMAD KHAN v HUSAINI BEGAM.

plaintiff herself was examined as a witness for the She states in her evidence that she has frequently isited by her husband since she left his home Neither the defendant has come forward to contradict her state- Nor does any step appear to have been taken on the d's part to sue for restitution of conjugal rights, which il Law of India permits On the whole their Lordships opinion that the judgement and decree of the High Court rect and ought to be affirmed

ir Lordships will therefore humbly advise His Majesty appeal be dismissed.

appellant will pay the costs

*Appeal dismissed.*

citors for the appellant —*Barrow, Rogers & Nevill*

citors for the respondent —*Ranken Ford, Ford & Chester.*

V. W

---

NATH AND OTHERS (PLAINTIFFS) v RATAN SINGH (DEFENDANT)

al from the Court of the Judicial Commissioner of Oudh at Lucknow ]

P. C
1910
*April* 19, 20
*June* 7.

*Law—Joint Hindu family—Family joint before annexation of Oudh—fiscation of and grant by Government to person who had been a member joint family—Whether subject of grant is self acquired or joint—Separation by one member effect of—Burden of proof*

Before the annexation of Oudh two estates Bohra and Sherpur (the latter being about one third of the two together) belonged to an undivided Hindu family consisting of three brothers The estates were confiscated on the annexation of the province but shortly afterwards the Sherpur estate was granted by the Government to the eldest of the three brothers (the other two being minors) who was the head and manager of the family, the grant being expressed to be by way of favour and award and not in consideration of proprietary right." In this appeal the appellants' (plaintiffs) case in a suit for a half of the self-acquired property held by the eldest brother at his death, t it was two-thirds or one third of Sherpur, depended on whether the granted was the self acquired property of the grantee, or the joint pro- the three brothers The appellants represented the second of the three

Present:—Lord MACNAGHTEN, Lord COLLINS, Sir ARTHUR WILSON and AMEER ALI

(1) (1

Act XVI of 1899 (Northern India Canal and Drainage) with foot notes, 1a (1a)

Act X of 1904 (Co operative Credit Societies) with reference to rules under the Act 5a 6p (1a)

Regulation III of 1818 (Bengal State Prisoners Regulation) as modified up to 1st August 1909 2a 9p (1a)

Regulation I of 1890 (British Baluchistan Laws Regulation) as modified up to 1st June, 1909 3p (1a)

## III—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN AS ORIGINALLY PASSED

Acts (Unrepealed) of the Governor General of India in Council from 1907 up to date

Regulations made under the Statute 33 Vict Cap 3 from 1907 up to date

The above may be obtained separately The price is noted on each ]

## IV—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL

Act XXI of 1850 (Caste Disabilities) with foot notes — In Urdu 3p (1a)
Ditto ditto — In Hindi 3p (1a)

Act XXXVII of 1850 (Public Servants Inquiries) as modified up to 1st August 1908 — In Urdu 9p (1a)
Ditto ditto — In Nagri 9p (1a)

Act XIII of 1857 (Opium), as modified up to 1st August 1908 — In Urdu 9p (1a)
Ditto ditto — In Nagri 9p. (1a)

Act IX of 1859 (Forfeiture) as modified up to 1st October, 1908 — In Urdu 3p (1a)
Ditto ditto — In Nagri 3p (1a)

Act XVI of 1863 (Excise) as modified up to 1st October 1908 — In Urdu 3p (1a)
Ditto ditto — In Nagri 3p (1a)

Act XXXI of 1863 (Official Gazette) with footnotes — In Urdu 3p (1a)
Ditto ditto — In Nagri 3p (1a)

Act XV of 1864 (Indian Tolls) as modified up to 30th June 1909 — In Urdu 3p (1a)
Ditto ditto — In Nagri 3p (1a)

Act X of 1865 (Succession) as modified up to 1st April 1909 — In Urdu 11a 3p (2a)
Ditto ditto — In Nagri 11a 3p. (2a)

Act XXII of 1867 (Sarais and Paraos) as modified up to 1st August, 1908 — In Urdu 6p (1a)
Ditto ditto — In Nagri 6p (1a)

Act XXV of 1867 (Press and Registration of Books) as modified up to 1st October 1907 — In Urdu 1a 3p (1a)
Ditto ditto — In Nagri 1a 3p. (1a)

Act X of 1870 (Unclaimed Deposits) as modified up to 1st October 1908 — In Nagri 3p (1a)

Act VII of 1870 (Court fees) as modified up to 1st February 1909 — In Urdu 5a 9p (1a)
Ditto ditto — In Nagri 5a 6p (1a)

Act XXVII of 1871 (Criminal Tribes) as modified up to 1st September 1909 — In Urdu. 1a 3p (1a)
Ditto ditto — In Nagri 1a. 3p (1a)

Act I of 1872 (Evidence) as modified up to 1st May 1909 — In Urdu 8a (2a)
Ditto ditto — In Nagri. 8a (2a)

Act I of 1878 (Opium) as modified up to 1st October 1907 — In Urdu 1a 6p (1a)
Ditto ditto — In Nagri 1a. 6p. (1a)

Act XII of 1880 (Kazis) with footnotes — In Urdu 3p (1a)

Act II of 1882 (Trusts) as modified up to 1st June 1909 — In Nagri 3a. 6p (1a)

Act XIII of 1889 (Cantonments) as modified up to 1st October 1907 — In Urdu 3a (1a. 6p)

out to be restored, when it was discovered that Gaya Din Singh is guilty of the offence of concealing arms, and the taluq was ecially confiscated in 1859 Subsequently, however, in consequence of services rendered by Gaya Din, the estate of Sherpur is restored to him, and expressed to be "granted by the Gov ament to him by way of favour and award and not in conleration of proprietary right"

The three brothers lived together until about 1865, when mrao went to live apart from his brothers, and in 1867 he ought a suit against Gaya Din for one third of the Sherpur tate Whilst this suit was pending Gaya Din Singh died witht male issue in 1869 Umrao Singh therefore applied that his im in the suit should be altered from one third to one half, d that Gaya Din Singh's widow Lochan Kuar, who had taken ssession of the estate, should be put on the record in her isband's place Umrao Singh and Lochan Kuar then came to agreement that the former should have the one third share iginally claimed by him and that Lochan Kuar should hold id manage for her life the remaining two thirds (the property ow in suit) and that "after her death Umrao Singh and his other Ratan Singh will be the sole proprietors" This agreeent was embodied in two orders of court, dated 20th August and h October, 1870. Ratan Singh was not a party to that litigaon.

Ratan Singh was maintained by Lochan Kuar and they lived gether amicably until about 1881 Ratan Singh then brought suit claiming possession of a third of the estate, which came on ppeal before the Judicial Commissioner, who held, on 31st Octo ɔr, 1881, that Gaya Din Singh had taken Sherpur under the rant from Government personally, and not as manager of a joint lindu family, and that consequently it was his self acquired roperty, and he accordingly dismissed Ratan Singh's claim. ut he made a declaration on the basis of an agreement which id been made between Lochan Kuar and Ratan Singh some ears before to the effect that the widow had no power of alienion and that the estate should pass on her death to Ratan ingh or his heirs in full proprietary right To this litigation Imrao Singh was not a party

## V—MISCELLANEOUS PUBLICATIONS.

Table showing Effect of Legislation in the Governor General's Council during 1906 ... ... ... ... ... 3a. 6p. (1a)

Ditto ditto during 1907 .. 2a 6p. (1a.)

Ditto ditto during 1908 ... 4a. (1a)

Ditto ditto during 1909 ... 3a 8p (1a)

Annual Indexes to the Acts of the Governor General of India in Council for 1906, 1907, 1908 and 1909. The price is noted on them

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date. Super-royal 4to Annual subscription Rs. 5 (Re. 1); single issue 4a., including postage.

List of General Rules and Orders under Statutes and General Acts in force in British India Corrected up to 31st December, 1908 ... Rs. 1-4-0. (3a)

Addenda and Corrigenda List No. 1 of 1909 to the List of General Rules and Orders ... ... ... ... ... 3p (1a)

Ditto ditto No. II of 1909 ... 7a. 6p. (1a)

Chronological Tables of the Indian Statutes compiled under the orders of the Government of India by F. G. Wigley, of the Inner Temple, Barrister-at-Law. Edition 1909 ... ... ... Rs. 4 (5a)

A Digest of Indian Law Cases, containing the High Court Reports and Privy Council Reports of Appeals from India, 1901-03, with an Index of cases, compiled under the orders of the Government of India, by F. G. Wigley, of the Inner Temple, Bar.-at-Law. Edition 1906. Rs. 10 Reduced to Rs. 3 per copy... ... ... (10a.)

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India, 1904, with an Index of cases, compiled under the orders of the Government of India, by C. E. Grey, Bar.-at-Law, Edition 1907. Re. 1. 4a Reduced to Re 1 per copy ... ... ... ... ... (5a)

Ditto ditto 1905, by C. E. Grey, Bar.-at-Law, Edition 1907 Re 1-4 Reduced to Re 1 per copy ... (6a.)

Ditto ditto .. 1906, by C E Grey, Bar.-at-Law, Edition 1908. Re. 1-4 Reduced to Re 1 per copy ... (5a)

Ditto ditto ... 1907, by B D. Bose, Bar-at-Law, Edition 1908. Re. 1-4 Reduced to Re. 1 per copy ... (5a.)

Ditto ditto 1908, by C. E. Grey, Bar.-at-Law, Edition 1910 ... ... ... ... ... Rs. 2 (6a.)

Set of Digests from 1901—1907. Reduced to Rs. 7 per set of 6 volumes) ... ... ... ... ... ... (Re. 2)

General Rules and Orders made under enactments in force in British India consisting of General Rules, Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index. In three Volumes. Rs. 15. Reduced to Rs 10 per set (Rs. 2) or Rs. 5 per Volume ... ... ... (12a)

Volume IV in the Press.

Title page and Contents of the Acts passed by the Governor General of India in Council in the year 1907 ... ... ... 1a. 6p (1a.)

Ditto ditto 1908 ... ... 6a. 9p. (1a)

Ditto ditto 1909 ... ... 3a. 3p. (1a)

decree." On the second issue he found that the plaintiff separated in 1273 and the defendant remained joint, and on the ninth he held that the suit was not barred by limitation; on the eighth issue he was of opinion that the widow's possession was consented to by the defendant, but was not held on his behalf.

From that decision both the plaintiffs and defendant preferred appeals to the court of the Judicial Commissioner, which were heard by Mr. E. CHAMIER, Judicial Commissioner, and Mr W. F. WELLS, 1st Additional Judicial Commissioner, the judgement being delivered by the former. They held that the intention of the grant of Sherpur to Gaya Din Singh was that he should hold the lands on behalf of the family, and that the family lived in union until about 1865 when Umrao Singh quarrelled with Gaya Din, and that the Sherpur estate accordingly was the joint property of the three brothers at least up to that date. They were of opinion that if the three brothers remained joint until the death of Gaya Din Singh the plaintiff's case must fail, for on Gaya Din's death his undivided interest in the property passed by survivorship to his two brothers and consequently the suit was barred by limitation. Ratan Singh, they held, (concurring with the Subordinate Judge) remained joint with Gaya Din Singh until the latter's death and thereupon became entitled by survivorship to two thirds of the estate. Accordingly they reversed the decision of the Subordinate Judge and dismissed the suit with costs.

The material portion of the judgement of the Judicial Commissioners was as follows:—

"At the time of the annexation of the province the three brothers Gaya Din, Umrao Singh and Ratan Singh were the proprietors of the Bohra and Sherpur estates living as a joint Hindu family, Gaya Din the eldest being the manager."

After stating the facts up to Gaya Din's release from prison and that "the Government sanctioned the restoration to him of one third of his property," the judgement continued:—

"The local authorities proposed to allot the Sherpur estate to him (Gaya Din Singh) that being the equivalent of one third of the two estates. This proposal was approved by the Chief Commissioner whose Secretary wrote on March 7th 1860, 'the share of the estate restored to Gaya Din will by this arrangement but slightly exceed a third which was the proportion sanctioned by Government to be restored to him' (plaintiffs' exhibit 2). Shortly afterwards Gaya Din presented a petition to the Deputy Commissioner of the district the object of which

## V – MISCELLANEOUS PUBLICATIONS

Table showing Effect of Legislation in the Governor General's Council during 1906 ... ... .. .. ... 3a 6p (1a)
Ditto ditto during 1907 2a 6p (1a)
Ditto ditto during 1908 ... 4a (1a)
Ditto ditto during 1909 3a 8p (1a)

Annual Indexes to the Acts of the Governor General of India in Council for 1906, 1907, 1908 and 1909 The price is noted on them

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date Super-royal 4to Annual subscription Rs 5 (Re 1); single issue 4a including postage

List of General Rules and Orders under Statutes and General Acts in force in British India Corrected up to 31st December, 1908 .. Rs. 1 4 0. (3a)

Addenda and Corrigenda List No 1 of 1909 to the List of General Rules and Orders .. ... ... ... .. 8p (1a)
Ditto ditto No II of 1909 .. 7a 6p. (1a)

Chronological Tables of the Indian Statutes compiled under the orders of the Government of India by F. G Wigley, of the Inner Temple, Barrister-at-Law Edition 1909 .. ... .. Rs 4 (5a)

A Digest of Indian Law Cases, containing the High Court Reports and Privy Council Reports of Appeals from India, 1901-03, with an Index of cases, compiled under the orders of the Government of India, by F. G Wigley, of the Inner Temple, Bar at-Law. Edition 1906 Rs 10 Reduced to Rs. 3 per copy . ... ... (10a)

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India, 1904, with an Index of cases, compiled under the orders of the Government of India, by C E Grey, Bar-at-Law, Edition 1907 Re 1 4a Reduced to Re 1 per copy . ... . .. (5a)
Ditto ditto 1905, by C E Grey, Bar at-Law, Edition 1907 Re 1 4 Reduced to Re 1 per copy . (5a)
Ditto ditto 1906, by C E Grey, Bar-at Law, Edition 1908 Re 1 4 Reduced to Re 1 per copy ... (5a)
Ditto ditto 1907, by B D Bose, Bar-at-Law, Edition 1908 Re 1 4 Reduced to Re. 1 per copy ... (5a)
Ditto ditto 1908, by C. E Grey, Bar-at-Law, Edition 1910 .. .. ... .. Rs 2 (5a)

Set of Digests from 1901—1907 Reduced to Rs 7 per set of 6 volumes) ... .. .. ... ... (Rs 2)

General Rules and Orders made under enactments in force in British India consisting of General Rules, Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index. In three Volumes Rs 15 Reduced to Rs 10 per set (Rs 2) or Rs. 5 per Volume ... ... . ... (12a)
Volume IV in the Press

Title page and Contents of the Acts passed by the Governor General of India in Council in the year 1907 ... ... ... 1a 6p (1a)
Ditto ditto 1908 ... ... 5a 9p (1a)
Ditto ditto 1909 ... ... 5a. 3p (1a)

'The next question is whether Gaya Din and Ratan Singh were joint in estate at the death of the former in 1869. It is not the case of either party that all three brothers remained joint in estate till the death of Gaya Din. If they remained joint till that time, the plaintiffs' case must fail, for on the death of Gaya Din his undivided interest in the property passed by survivorship to Umrao Singh and Ratan Singh and the present suit is obviously barred by limitation.

"In his statement in 1868 (exhibit A8) Umrao Singh said that he and his two brothers had been joint in estate till 1272 Fasli, 1865, and that Gaya Din had turned him out in that year, but that Ratan Singh had continued joint with Gaya Din. In his statement as a witness in a suit brought by Ratan Singh against Lochan Kuar in 1881, Umrao Singh said (exhibit A9) that he and Ratan Singh had sued for a one third share each, that he, Umrao Singh, had gone on with his case but Ratan Singh had withdrawn his claim, compromised with Gaya Din and continued to live jointly with him, and that he, Umrao Singh, had been quite separate since the compromise between Ratan Singh and Gaya Din

'In the present case when examined as a witness for the defence, Umrao Singh stated that the three brothers had been joint in all respects until the quarrel between Gaya Din and himself, when he claimed his share and went away to Rudarpur, that Ratan had stayed on at Khurd with Gaya Din, and that no partition had ever taken place between the two last named Umrao Singh has, therefore, on three separate occasions distinctly stated that, while he separated and went to Rudarpur, Ratan Singh and Gaya Din remained joint as before The defendant Ratan Singh also swore in the present case that Umrao Singh separated some years before the death of Gaya Din, while he and Gaya Din remained joint.

"The suit of Umrao Singh for a one third share was still pending when Gaya Din died It appears that on the death of Gaya Din Umrao Singh amended his claim and demanded a $\frac{9}{16}$ths share in the estate on the ground that on Gaya Din's death the whole property vested in Ratan Singh and himself, and that he was entitled to an extra share on the ground of jetbansi (an allowance for an eldest son) The petition in which he put forward this claim has not been proved, but the facts are sworn to by Umrao Singh and have not been disputed. However, Umrao Singh compromised with Lochan Kuar and *accepted a decree for a one third share. The compromise which is* the plaintiff's exhibit No 13 has not been proved, but the fact is not disputed, and exhibit No 14 which is the judgement of the Settlement Officer, Mr. Gordon Young, shows that the suit was compromised in August 1870 The terms of the compromise were not correctly recited by Mr Young and there appears to have been an application by Lochan Kuar for review of judgement (see exhibit A6, which is the order, dated October 7th, 1870, on that application) It shows that the judgement of the Settlement Officer was amended so as to make it clear that Umrao Singh was entitled to manage his one third share only and that Lochan Kuar was entitled to retain the remaining two thirds

'With these proceedings should be read Exhibit A7, the will of Lochan Kuar, dated December 3rd, 1870, and Exhibit A8, an, *iqrarnama* executed by

Act XII of 1855 (Legal Representatives' Suits) as modified up to 1st November, 1904 ... 1 a. (1 a.)

Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903 ... 2 a. (1 a.)

Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December, 1903 ... 1 a. 6 p. (1 a.)

Act XX of 1856 (Bengal Chaukidars), as modified up to 1st November, 1903 ... 7 a. (1 a.)

Act IV of 1857 [Tobacco, (Bombay Town)], as modified up to 1st December, 1906 ... 3 a. 9 p. (1 a.)

Act XXIX of 1857 (Land Customs, Bombay), as modified up to 1st December, 1896 ... 4 a. (1 a.)

Act III of 1858 (State Prisoners), as modified up to 1st August, 1897 ... 2 a. (1 a.)

Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903 ... 4 a. 3 p. (1 a)

Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903 ... 2 a. 3 p. (1 a.)

Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902 ... 5 a. (1 a)

Act I of 1859 (Merchant Shipping), as modified up to 30th June, 1905... 13 a. (2 a.)

Act XI of 1859 (Bengal Land Revenue Sales), as modified up to 1st August, 1906 ... 4 a. (1 a.)

Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1871 ... 1 a. 6 p. (1 a)

Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December, 1904 ... 1 a. 6 p. (1 a)

Act XXI of 1860 (Societies Registration), as modified up to 1st December, 1904 ... 2 a. 9 p. (1 a)

Act XLV of 1860 (Indian Penal Code), as modified up to 1st April, 1903, with an Index ... Rs. 2 8 (5 a)

Act V of 1861 (Police) as modified up to 7th March, 1903 ... 7 a. 6 p. (1 a. 6 p.)

Act XVI of 1861 (Stage-carriages), as modified up to 1st February, 1898 ... 3 a. 6 p. (1 a.)

Act XXIII of 1863 (Claims to Waste-lands), as modified up to 1st December, 1896 ... 4 a. 9 p. (1 a.)

Act III of 1864 (Foreigners), as modified up to 1st September, 1906 ... 3 a. 6 p. (1 a.)

Act XVII of 1864 (Official Trustees), as modified up to 1st July, 1890 ... 5 a. 6 p. (1 a.)

Act III of 1865 (Carriers) as modified up to 31st May, 1903 ... 3 a. (1 a.)

Act III of 1867 (Gambling), as modified up to 1st January, 1905 ... 4 a. (1 a.)

Act XX of 1869 (Volunteers), as modified up to 1st May, 1896 ... 4 a. 9 p. (1 a.)

Act I of 1871 (Cattle Trespass), as modified up to 1st May, 1900 ... 6 a. (1 a)

Act III of 1872 (Special Marriages), as modified up to 1st November, 1906 ... 4 a. 0 p. (1 a)

Act IV of 1872 (Punjab Laws,) as modified up to 1st November, 1904 .. 7 a. (1 a.)

Act XV of 1872 (Christian Marriage), as modified up to 1st December, 1904 ... 10 a. (2 a.)

Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903 ... 3 a. 6 p. (1 a.)

Act X of 1873 (Oaths), as modified up to 1st February, 1903 ... 3 a. 9 p. (1 a.)

Act II of 1874 (Administrator-General), as modified up to 1st July, 1890; with a list of Native States included within the Presidencies of Bengal, Madras and Bombay, respectively, for the purposes of the Act ... 11 a. (2 a.)

Act XIV of 1874 (Scheduled Districts), as modified up to 1st October, 1895 ... 6 a. (1 a.)

1910

KEDAR NATH v. RATAN SINGH

not in consideration of proprietary right" In the suit in 1881, in which Ratan Singh sued the widow of Gaya Din Singh for possession of one third of the estate the Judicial Commissioner held that the grant was made to Gaya Din Singh personally and not as the manager of a joint Hindu family, and was consequently his self acquired property, irrespective of the question whether he and his brothers formed a joint family or not The effect of confiscation was to extinguish any previous title any subsequent claimant must show a re grant and if there was a grant, the property, it was submitted, was the self acquired property of the grantee or grantees In this case Gaya Din Singh was the sole grantee Reference was made to Syke's Compendium of Taluqdari Law page 0 Appendix B, paragraph 4, and the Letter from the Secretary to Government to the Chief Commissioner of Oudh of 10th October, 1858, at page 285 of the same book, Mayne's Hindu Law, 7th edition, page 358, paragraph 286, *Malka Jahan Sahiba* v *Deputy Commissioner of Lucknow* (1) and *Jehan Kadr* v *Afsur Bahu* (2) If the three brothers formed a joint family after the grant, which it was contended they did not do, there was at any rate a separation in 1865 when Umrao Singh left them and went away There was "no presumption when one coparcener separated from the others that the latter remain united", and "an agreement amongst the members of a joint family to remain united or to reunite must be proved like any other fact" see *per* Lord Davey in *Balabux* v *Rukhmabai* (3), and *Balkishen Das* v *Ram Narain Sahu* (4) As to how partition was effected, by agreement to separate, by declaratory decree that property was partible and defining shares pending inquiry or by decree in a suit by one member of a joint family for his share, as was the case here, reference was made to *Appovier* v *Rama Subba Aiyan* (5), *Parbati* v *Naunihal Singh* (6), *Joy Narain Giri* v *Girish Chunder Myti* (7) and *Chidambaram Chettiar* v *Gauri Nachiar* (8) Umrao Singh became

(1) (1870) L. R 6 I A, 63 (73)

(2) (1878) I L R 4 Calc 727 (732); L R 6 I A 76 (83)

(3) (1903) I L R, 30 Calc, 725 (736) L R 30 I A, 130 (137)

(4) (1903) I. L R 30 Calc 738 (753); L R, 30 I A, 139 (149)

(5) (1866) 11 Moo I A, 75

(6) (1909) I L R 31 All 412, L. R 36 I A 71

(7) (1878) I L R 4 Calc., 434, L. R 5 I A, 228

(8) (1879) I L R, 2 Mad 83, L. R 6 I A, 177.

Act XII of 1891 (Repealing and Amending Act, showing the Schedules as modified up to 31st May, 1902) . ... ... 12 a. (1 a 6 p)
Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 ... .. .. ... 1 a. 3 p (1 a)
Act I of 1894 (Land Acquisition), with footnotes ... .. 7 a (1 a.)
Act VIII of 1894 (Tariff), as modified up to 1st February, 1906 .. 9 a (2 a)
Act IX of 1894 (Prisons) as amended by the Burma Laws Act, 1898 ... 7 a 6 p (1 a 6 p)
Act XII of 1896 (Excise), as modified up to 1st March, 1907 ... 8 a. (2 a)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... 1 a 6 p (1 a)
Act II of 1899 (Stamps), as modified up to 1st March, 1907. . ... Re 1 (2 a)
Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 ... ... ... ... ... 1 a. (1 a)
Act III of 1900 (Prisoners), as modified up to 1st March, 1905 .. 6 a 6 p. (1 a)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904 .. 5 a. 6 p. (1 a)
Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 ... ... ... ... ... 6 a. 6 p (1 a)
Regulations V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 .. ... ... ... ... 1 a. 9 p. (1 a)
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... ... ... 5 a 6 p. (1 a)
Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June, 1894 . . ... ... ... ... 13 a. (2 a)
Regulation VI of 1886 (Ajmere Rural Boards), as modified up to 1st February, 1897 ... ... ... ... 5 a 6 p. (1 a)
Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899 ... ... ... ... 4 a. 9 p. (1 a)
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902 . ... ... ... ... ... 6 a. (1 a)

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1906.
Regulations made under the Statute 33 Vict. Cap 3, from No II of 1875 to 1906. 8 vo Stitched.

[The above may be obtained separately. The price is noted on each.]

## IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Act X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893, with footnotes brought down to 1st December 1901 .. ... ... .. In Urdu. 2 a 6 p (1 a)
Act XX of 1847 (Copyright), as modified up to 1st May, 1896 ... In Urdu. 1 a 3 p (1 a)
Ditto ditto ... In Nagri 1 a 3 p (1 a)
Act XVIII of 1850 (Judicial Officers' Protection), with footnotes ... In Urdu 6 p (1 a)
Ditto ditto ... In Nagri 6 p (1 a)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903 In Urdu. 6 p (1 a)
Ditto ditto ... In Nagri 6 p (1 a)
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1903 .. ... ... .. ... In Urdu. 6 p (1 a)
Ditto ditto .. In Nagri 6 p. (1 a)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st December, 1904 ... ... .. ... ... In Urdu 3 p. (1 a)
Ditto ditto ... In Nagri. 3 p. (1 a)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903 ... . .. ... ... .. In Urdu. 6 p (1 a)
Ditto ditto ... In Nagri. 6 p (1 a)

until the death of the latter became then entitled to the whole of the property; or in any case he became so entitled under the family arrangement made for his benefit; and the suit was therefore rightly dismissed by the Judicial Commissioner's Court.

*DeGruyther, K. C.*, in reply submitted that the question whether a family was joint or separate was a question of law, or at least a mixed question of law and fact, citing *Paulem Valoo Chetty v. Paulem Sooryah Chetty* (1) and *Parbati v. Naunihal Singh* (2) where the strict rule as to concurrent decisions had been relaxed. But, even if it was a question of fact, the decisions of the courts below were not concurrent, the decision of the Judicial Commissioners being totally inconsistent with that of the Subordinate Judge. As to reunion Mayne's Hindu Law, 7th edition, page 673, paragraph 196 was referred to, and as to the possession of a widow only entitled to maintenance being adverse *Sham Koer v. Dah Koer* (3) was cited. Reference was made to *Hur Purshad v. Sheo Dyal* (4), and that case was distinguished as to the effect of the confiscation of property in Oudh, and the terms of the proclamation of Government in 1858) see Sykes' compendium of Taluqdari Law, page 378, Appendix B) and *Hardeo Bux v. Jawahir Singh* (5) were referred to. No person who had received a grant from Government had ever considered himself a trustee for the members of his family.

1910, *June 7th*.—The judgement of their Lordships was delivered by Lord MACNAGHTEN.—

This is an appeal from the Court of the Judicial Commissioner of Oudh.

It seems that before the annexation of Oudh two estates, called Bohra and Sherpur, belonged to an undivided Hindu family, the members of which then were three brothers, Gaya Din, Umrao, and Ratan. They were born of different mothers. Gaya Din was much the eldest, and a man of about middle age. He was the manager. The other two were minors. Umrao was quite young, and Ratan at the time was a mere child. After the confiscation the Government was minded to restore the family

(1) (1877) I. L. R., 1 Mad., 252 (258); L. R. 4 I. A. 109 (114).

(2) (1909) I. L. R. 31 All., 412 (421), L. R., 36 I. A., 71 (76).

(3) (1902) I. L. R., 29 Calc., 664; L. R. 29 I. A., 135.

(4) (1876) L. R. 3 I. A. 259 (269, 273).

(5) (1877) I. L. R., 3 Calc. 522 (538); L. R., 4 I. A., 178 (197).

Act XII of 1891 (Repealing and Amending Act, showing the Schedules as modified up to 31st May, 1902) ... ... 12 a. [illegible]

Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 .. . .. 1 a 3 p

Act I of 1894 (Land Acquisition) with footnotes . 7 a (1 a)

Act VIII of 1894 (Tariff) as modified up to 1st February, 1906 . 9 a (2 a)

Act IX of 1894 (Prisons) as amended by the Burma Laws Act, 1898 .. 7 a 6 p (1 a)

Act XII of 1896 (Excise) as modified up to 1st March, 1907 . 8 a (2 a)

Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 . 1 a 6 p (1 a)

Act II of 1899 (Stamps), as modified up to 1st March, 1907. .. Re 1 (2 a)

Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 . . . ... .. 1 a (1 a)

Act III of 1900 (Prisoners), as modified up to 1st March, 1905 6 a 6 p (1 a)

Act XV of 1903 (Extradition), as modified up to 1st December, 1904 5 a 6 p (1 a)

Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 . . . .. . 6 a 6 p (1 a)

Regulations V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 .. ... ... .. 1 a 9 p (1 a)

Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 ... .. .. 5 a 6 p. (1 a)

Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June, 1894 . .. ... ... 13 a (2 a)

Regulation VI of 1886 (Ajmere Rural Boards), as modified up to 1st February, 1897 .. ... ... 5 a 6 p (1 a)

Regulation V of 1893 (Sonthal Parganas Justice) as modified up to 1st October, 1899 . ... ... .. 4 a. 9 p (1 a)

Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902 .. ... ... ... 6 a. (1 a)

## III —ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1906
Regulations made under the Statute 33 Vict Cap 3, from No II of 1875 to 1906. 8vo stitched.

[The above may be obtained separately The price is noted on each ]

## IV —TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL

Act X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893, with footnotes brought down to 1st December 1901 .. ... . In Urdu 2 a 6 p (1 a)

Act XX of 1847 (Copyright), as modified up to 1st May, 1896 ... In Urdu 1 a 3 p (1 a)

Ditto ditto . In Nagri 1 a 3 p (1 a)

Act XVIII of 1850 (Judicial Officers' Protection), with footnotes In Urdu 6 p (1 a)

Ditto ditto .. In Nagri 6 p (1 a)

Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903 In Urdu 6 p (1 a)

Ditto ditto ... In Nagri 6 p (1 a)

Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902 ... ... .. In Urdu 6 p (1 a)

Ditto ditto . . In Nagri 6 p (1 a)

Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st December 1903 ... ... . . ... In Urdu 3 p (1 a)

Ditto ditto .. In Nagri 3 p (1 a)

Act XIII of 1855 (Fatal Accidents) as modified up to 1st December, [illegible] ... .. ... .. In Urdu 6 p (1 a)

Ditto ditto .. In Nagri 6 p (1 a)

claimed one third in a suit which he brought against the widow, alleging that she was wasting the estate

1910

KEDAR NATH v. RATAN SINGH

Gaya Din's widow died in 1896 In 1900, Umrao, with a assistance of his co plaintiff, a mortgagee, brought forward his claim asserting that Sherpur was Gaya Din s self acquired property The Subordinate Judge of Sitapur decided in his favour, but in the Court of the Judicial Commissioner this decision was reversed, and the suit was dismissed The judgement was delivered by Mr Chamier, the Judicial Commissioner "It appears to me" said the learned Judge, "to be clear that Ratan Singh remained joint with Gaya Din till the latter's death, and then became entitled to two thirds of the property In my opinion the plaintiffs have altogether failed to prove that Gaya Din died entitled to either two thirds or one third of the Sherpur estate as separate property"

Their Lordships agree in that opinion, and they will therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellants will pay the costs of the appeal

*Appeal dismissed*

Solicitors for the appellants —*T L Wilson & Co*

Solicitors for the respondent —*Barrow, Rogers, & Nevill*

J V W

---

## FULL BENCH

1910
*May* 16

*Before Sir John Stanley Knight Chief Justice Mr Justice Griffin and Mr Justice Tudball*

WARIS ALI KHAN (DEFENDANT) v PARSOTAM NARAIN (PLAINTIFF) *

*Act (Local) No II of 1901 (Agra Tenancy Act) section* 201 (3)—*Act No I of 1872 (Indian Evidence Act) section 4—Evidence—Presumption—Record of plaintiff s name as a co-sharer*

*Held* by STANLEY C J and GRIFFIN J (TUDBALL J *dissentiente*) that the presumption enjoined by clause (3) of section 201 of the Agra Tenancy Act 1901, is not a conclusive but merely a rebuttable presumption *Dil Kunwar* v *Udai Ram* (1) *Bechan Singh* v *Karan Singh* (2) *Dhanka* v *Umrao Singh* (3) *Banwari Lal* v *Madar* (4) *Gobindi* v *Saheb Ram* (5) and *Bhawani Singh* v *Dilawar Khan* (6) referred to

---

* Appeal No 159 of 1909 under section 10 of the Letters Patent.

(1) (1906) I L R 29 All 148
(2) (1908) I L R 30 All 447
(3) Weekly Notes 1907 p 43 and in L P A I L R, 30 All, 58
(4) (1906) I L R 29 All 158
(5) (1909) I L R 31 All 257
(6) (1909) I L R 31 All 253

| | |
|---|---|
| Act XVI of 1873 (Village and Road Police, United Provinces) ... | In Urdu. 1 *a*. (1 *a*) |
| Act IX of 1874 (European Vagrancy) ... | In Urdu. 2 *a* (1 *a*) |
| Act IX of 1875 (Majority), as modified up to 1st May, 1906 ... | In Urdu. 3 *p*. (1 *a*) |
| Ditto ditto ... | In Nagri. 3 *p*. (1 *a*) |
| Act XI of 1876 (Presidency Banks), as modified up to 1st March, 1906 ... | In Urdu. 3 *a*. 9 *p*. (1 *a*) |
| Ditto ditto ... | In Nagri 3 *a*. 6 *p* (1 *a*) |
| Act XVIII of 1876 (Oudh Laws) ... | In Urdu 2 *a* (1 *a*) |
| Act I of 1877 (Specific Relief), as modified up to 1st February, 1904 ... | In Urdu. 4 *a* 6 *p*. (1 *a*) |
| Ditto ditto ... | In Nagri. 4 *a*. 6 *p*. (1 *a*) |
| Act I of 1878 (Opium), as modified up to 1st December, 1896 ... | In Nagri. 1 *a* 6 *p*. (1 *a*) |
| Act VII of 1878 (Forests), as modified up to 1st December, 1903 ... | In Urdu. 4 *a*. (1 *a* 6 *p*) |
| Ditto ditto ... | In Nagri. 4 *a*. (1 *a* 6 *p*) |
| Act XI of 1878 (Arms), as modified up to 1st May, 1904 ... | In Urdu. 2 *a*. (1 *a*) |
| Ditto ditto ... | In Nagri. 2 *a* (1 *a*) |
| Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1902 ... | In Urdu. 2 *a*. (1 *a*) |
| Ditto ditto ... | In Nagri. 2 *a*. (1 *a*) |
| Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May, 1896 ... | In Urdu. 2 *a* 6 *p*. (1 *a*) |
| Ditto ditto ... | In Nagri. 2 *a* 6 *p*. (1 *a*) |
| Act XV of 1881 (Factories), as modified up to 1st April, 1891 ... | In Urdu. 1 *a* 6 *p* (1 *a*) |
| Ditto ditto ... | In Nagri 1 *a* 6 *p* (1 *a*) |
| Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to the 1st November, 1898 ... | In Urdu. 9 *a*. (1 *a* 6 *p*) |
| Ditto ditto ... | In Nagri. 9 *a*. (1 *a* 6 *p*) |
| Act IV of 1882 (Transfer of Property), as modified up to 1st March, 1900 ... | In Urdu. 6 *a*. 9 *p*. (2 *a*) |
| Ditto ditto ... | In Nagri. 6 *a*. 9 *p*. (2 *a*) |
| Act VI of 1882 Companies), as modified up to 1st August, 1906 ... | In Urdu. 13 *a* 9 *p*. (3 *a*) |
| Ditto ditto ... | In Nagri. 14 *a*. (3 *a*) |
| Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1906 ... | In Urdu 1 *a*. (1 *a*) |
| Ditto ditto ... | In Nagri. 1 *a*. (1 *a*) |
| Act IV of 1884 (Explosives), as modified up to 1st May, 1896 ... | In Urdu. 1 *a*. 3 *p*. (1 *a*) |
| Ditto ditto ... | In Nagri. 1 *a*. 3 *p*. (1 *a*) |
| Act VI of 1884 (Inland Steam-Vessels), as modified up to 1st July, 1891 ... | In Urdu 3 *a*. 6 *p*. (1 *a* 6 *p*) |
| Ditto ditto ... | In Nagri. 3 *a*. 6 *p* (1 *a*. 6 *p*) |
| Act XII of 1884 (Agriculturists Loans), as modified up to 1st September, 1906 ... | In Urdu. 6 *p* (1 *a*) |
| Ditto ditto ... | In Nagri. 6 *p* (1 *a*) |
| Act XVIII of 1884 (Punjab Courts), as modified up to 1st December, 1899 ... | In Urdu. 2 *a* 6 *p*. (1 *a*) |
| Act II of 1885 (Negotiable Instruments Amendment) ... | In Urdu. 9 *p*. (1 *a*) |
| Act III of 1885 (Transfer of Property Amendment) ... | In Urdu 3 *p*. (1 *a*) |
| Act X of 1885 (Oudh Estates Amendment) ... | In Urdu. 3 *p*. (1 *a*) |
| Act XIII of 1885 (Telegraphs), as modified up to 1st March 1905 ... | In Urdu. 1 *a*. 9 *p* (1 *a*) |
| Act XXI of 1885 (Madras Civil Courts Amendment) ... | In Urdu. 3 *p* (1 *a*) |
| Act II of 1886 (Income-tax), as modified up to 1st April, 1903 ... | In Urdu. 3 *a*. (1 *a* 9 *p*) |
| Ditto ditto ... | In Nagri. 3 *a*. (1 *a* 9 *p*) |
| Act IV of 1886 (Amending Section 25 of Contract Act) ... | In Urdu. 3 *p* (1 *a*) |
| Act VI of 1886 (Births, Deaths and Marriage Registration) ... | In Urdu. 1 *a* 3 *p*. (1 *a*) |
| Act X of 1886 (Criminal Law Amendment) ... | In Urdu. 9 *p* (1 *a*) |
| Act XI of 1886 (Tramways), as modified up to 21st December, 1900 ... | In Urdu. 3 *a*. 3 *p* (1 *a*) |
| Ditto ditto ... | In Nagri 3 *a* 3 *p* (1 *a*) |

1910

WARIS ALI KHAN v. PARSOTAM NARAIN

and on the file of the record the judgement *inter partes* of a court of competent jurisdiction to the effect that the plaintiff had no proprietary right to the plots mentioned in the written statement of the defendant'

In the case before me there is no decree *inter partes* The decree of the Civil Court is in favour of Musammat Munna and such being the case, the fact that the plaintiff in the case before me is a recorded co sharer, the Revenue Court, under section 201 clause (3) of the Agra Tenancy Act is bound to give effect to it. No doubt, there is a conflict of opinion regarding the interpretation of clause (3) of section 201 of the Agra Tenancy Act, but I adhere to my opinion expressed in Second Appeal No 152 of 1907 (*Har Prasad* v *Baqar*) I therefore set aside the decree of both the courts below and remand the case to the court of first instance through the lower appellate court under order XLI, rule 23 for trial of the remaining issues Costs will abide the result'

Against this judgement the defendant appealed under section 10 of the Letters Patent

Babu *Surendra Nath Sen*, for the appellant relied on clause (3) of section 201 of the Agra Tenancy Act, and submitted that the expression " shall presume " could not be taken to mean " presume conclusively " The presumption was a rebuttable one The section only laid the onus on the party seeking to question the entry Entries in khewats were made under chapter III of the Revenue Act, and section 44 of the Act provided what probative force was to be given to these entries They were *primâ facie* evidence of the title recorded—see section 57 of the Revenue Act Whenever the Legislature contemplated that entries should be conclusive proof of title, some provision to that effect would be found, as in section 9 of the Tenancy Act According to section 177 of the Tenancy Act the question of proprietary title being discussed in the court of first instance was a necessary condition of appeal to the District Judge There would be no appeal to the District Judge if the question of title could not be raised in the first court and the entries were taken to afford irrebuttable presumption of title If it were otherwise, neither court would be able to go into the question of title, because the first court would be barred from considering it and the appellate court could not go into it unless it had been raised in the court below He cited *Dil Kunwar* v *Udai Ram* (1) *Banwari Lal* v *Nirader* (2), *Dhanka* v *Umrao Singh* (3), *Mihin Lal* v *Badri Prasad* (4), *Har Prasad*

(1) (1906) I L R, 29 All 148
(2) (1906) I L R, 29 All, 158
(3) Weekly Notes 1907, p 43
(4) (1905) I L R 27 All, 436

| | | |
|---|---|---|
| Act II of 1892 (Christian Marriage Validation) ... ... | In Urdu. | 3 p. (1 a.) |
| Act IV of 1892 (Bengal Court of Wards Amendment) ... ... | In Urdu. | 6 p. (1 a.) |
| Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) ... | In Urdu. | 3 p. (1 a.) |
| Act IV of 1893 (Partition) ... ... ... ... | In Urdu. | 3 p. (1 a.) |
| Act I of 1894 (Land Acquisition) ... ... | In Urdu. | 2 a. 3 p. (1 a. 6 p.) |
| Ditto ... ... ... | In Nagri. | 1 a. 6 p. (1 a. 6 p.) |
| Act III of 1894 (Criminal Procedure and Penal Codes Amendment) ... | In Urdu | 3 p. (1 a.) |
| Act V of 1894 (Civil Procedure Code Amendment) ... ... | In Urdu | 3 p. (1 a.) |
| Ditto ditto ... ... | In Nagri. | 3 p. (1 a.) |
| Act VIII of 1894 (Tariff), as modified up to 1st October 1903 ... | In Urdu | 4 a. (1 a.) |
| Ditto ditto ... | In Nagri. | 3 a. 9 p. (2 a.) |
| Act IX of 1894 (Prisons) ... ... ... ... | In Urdu. | 2 a. 3 p. (1 a.) |
| Ditto ... ... ... ... | In Nagri. | 2 a. 3 p. (1 a.) |
| Act VII of 1895 (Civil Procedure Code and Punjab Law Act Amendment) ... ... ... ... | In Urdu. | 3 p. (1 a.) |
| Ditto ditto ... | In Nagri. | 3 p. (1 a.) |
| Act XII of 1895 (Companies—Memorandum of Association) ... | In Urdu. | 3 a. (1 a.) |
| Act XIV of 1895 (Pilgrim Ships) ... ... ... | In Urdu. | 1 a. 3 p. (1 a.) |
| Act II of 1896 (Cotton-duties) ... ... ... | In Urdu. | 1 a. 3 p. (1 a.) |
| Ditto ... ... ... | In Nagri. | 1 a. (1 a.) |
| Act VI of 1896 (Indian Penal Code Amendment) ... ... | In Urdu. | 3 p. (1 a.) |
| Act VIII of 1896 (Inland Bonded Warehouses) ... ... ... | In Urdu. | 3 p. (1 a.) |
| Ditto ditto ... ... | In Nagri. | 3 p. (1 a.) |
| Act XII of 1896 (Excise), as modified up to 1st August 1905 ... | In Nagri. | 3 a. 3 p. (1 a.) |
| Act I of 1897 [Public (Servants Inquiries) Amendment.] ... | In Urdu. | 3 p. (1 a.) |
| Ditto ditto ... ... | In Nagri. | 3 p. (1 a.) |
| Act II of 1897 (Criminal Tribes Amendment) ... .. | In Urdu. | 3 p. (1 a.) |
| Act III of 1897 (Epidemic Diseases) ... ... ... | In Urdu | 3 p. (1 a.) |
| Ditto ... ... ... | In Nagri. | 3 p. (1 a.) |
| Act IV of 1897 (Fisheries) ... ... ... ... | In Urdu. | 3 p. (1 a.) |
| Ditto ... ... ... | In Nagri. | 3 p. (1 a.) |
| Act VI of 1897 (Negotiable Instruments Act Amendment) ... ... | In Urdu. | 3 p. (1 a.) |
| Ditto ditto ... ... | In Nagri. | 3 p. (1 a.) |
| Act VIII of 1897 (Reformatory Schools) ... ... ... | In Urdu. | 1 a. 3 p. (1 a.) |
| Ditto ... ... .. | In Nagri. | 6 p. (1 a.) |
| Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... | In Urdu. | 9 p. (1 a.) |
| Ditto ditto ... | In Nagri. | 9 p. (1 a.) |
| Act X of 1897 (General Clauses) ... .. ... ... | In Urdu. | 1 a. (1 a.) |
| Ditto ... ... ... ... | In Nagri | 1 a. (1 a.) |
| Act XII of 1897 (Local Authorities Emergency Loans) ... ... | In Urdu. | 3 p. (1 a.) |
| Ditto ditto ... | In Nagri. | 3 p. (1 a.) |
| Act XV of 1897 (Cantonments) ... ... ... ... | In Urdu | 3 p. (1 a.) |
| Act I of 1898 [Stage-carriages Act (1861) Amendment] ... ... | In Urdu | 3 p. (1 a.) |
| Ditto ditto ... ... | In Nagri. | 3 p. (1 a.) |
| Act III of 1898 (Lepers) ... ... ... ... | In Urdu. | 6 p. (1 a.) |
| Ditto ... ... ... ... ... | In Nagri. | 6 p. (1 a.) |
| Act IV of 1898 (Indian Penal Code Amendment) ... ... | In Urdu. | 3 p. (1 a.) |
| Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1900 ... ... ... ... | In Urdu. | Rs. 1-4 (8 a.) |
| Ditto ditto ... ... | In Nagri. | Rs. 1-0 (8 a.) |
| Act VI of 1898 (Post Office) ... ... ... ... | In Urdu. | 3 a. 3 p. (1 a.) |
| Ditto ... ... ... ... | In Nagri. | 3 a. 3 p. (1 a.) |
| Act IX of 1898 (Live-stock Importation) ... ... ... | In Urdu. | 3 p. (1 a.) |
| Ditto ... ... ... ... | In Nagri | 3 p. (1 a.) |
| Act X of 1898 (Indian [illegible]) ... ... ... | In Urdu. | 3 p. (1 a.) |

rebutting evidence was put before the Revenue Court and a decree passed for profits according to entries in khewats could not be touched by a Civil Court trying the question of title.

TUDBALL, J.—This appeal arises out of a suit for profits brought by a recorded co sharer under section 161 of the Tenancy Act against a landholder, who is appellant before us. On second appeal to this Court the learned Judge before whom this case came held that on the true construction of clause (3) of section 201 of the Agra Tenancy Act a Revenue Court had no power to *go behind the entry in the record of rights.* In that view he remanded the case for trial of the remaining issues.

It is urged before us that the learned Judge is in error for the following reasons: *first*, because the words "shall presume" in the above mentioned clause must be held to mean "shall presume until the contrary is proved," and the Revenue Court is therefore entitled to go into the point and decide whether or not the plaintiff actually has title, and an appeal will lie from its decision to the District Judge under section 177 (*c*) of the Act; *secondly*, that the Court ought not to read the word "conclusively" into clause (3); *thirdly*, that the same meaning should be given to the words "shall presume" in this clause as is given to them in section 4 of the Indian Evidence Act. In this respect stress is laid on the fact that in sections 44 and 57 of the Revenue Act, III of 1901, the Legislature has laid down that the entries in the record of rights are to be presumed to be true until the contrary is proved; and in section 9 of the Tenancy Act it has been clearly laid down that certain entries made at the last revision of records shall be conclusive proof of certain facts. The argument is that if the Legislature had intended the presumption mentioned in section 201 (3) to be conclusive, it would have plainly said so It is further contended that if the Revenue Court cannot go behind the entry in the khewat, certain dire calamities will occur, namely, that there will be no appeal to the District Judge in suits the valuation of which is Rs. 100 or under; that the Revenue Court will be bound by clerical errors and by fictitious entries, such as the entry of a Hindu widow's name for consolation, and would have to give decrees to persons who clearly had no title at all. The whole of the argument for

| | | |
|---|---|---|
| Act V of 1902 (Administrators General and Official Trustees) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a.) |
| Act VII of 1902 [United Provinces (Designation)] | In Urdu | 3 p (1 a) |
| Act VIII of 1902 (Indian Tariff) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a.) |
| Act II of 1903 [Indian Post Office (Amendment)] | In Urdu. | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act III of 1903 (Electricity) | In Urdu | 2 a 6 p (1 a 6 |
| Ditto | In Nagri | 2 a (1 a 6 p) |
| Act VII of 1903 (Works of Defence) | In Urdu. | 1 a 3 p (1 a) |
| Ditto | In Nagri | 1 a 3 p (1 a) |
| Act VIII of 1903 (Probate and Administration) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act IX of 1903 (Tea Cess) | In Urdu. | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act X of 1903 (Victoria Memorial) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p. (1 a) |
| Act XIII of 1903 (Lepers) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri. | 3 p (1 a) |
| Act XIV of 1903 (Indian Foreign Marriages) | In Urdu. | 3 p (1 a) |
| Ditto | In Nagri. | 3 p (1 a) |
| Act XV of 1903 (Extradition), as modified up to 1st December, 1904 | In Urdu | 1 a 9 p (1 a) |
| Ditto ditto | In Nagri | 1 a 9 p (1 a) |
| Act I of 1904 (Poisons) | In Urdu | 6 p (1 a) |
| Ditto | In Nagri | 6 p (1 a) |
| Act III of 1904 (Local Authorities Loan) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act IV of 1904 (North-West Border Military Police) | In Urdu | 9 p (1 a) |
| Act VI of 1904 [Transfer of Property (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VII of 1904 (Ancient Monuments Preservation) | In Urdu | 9 p (1 a) |
| Ditto ditto | In Nagri | 9 p (1 a) |
| Act VIII of 1904 (Indian Universities) | In Urdu | 1 a 3 p (1 a) |
| Ditto | In Nagri | 1 a 3 p (1 a) |
| Act X of 1904 (Co operative Credit Societies) | In Urdu | 1 a (1 a) |
| Ditto | In Nagri. | 1 a (1 a) |
| Act XI of 1904 (to revive and continue section 8 B of the Indian Tariff Act, 1894) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act XIII of 1904 (Indian Articles of War Amendment) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act XV of 1904 [Indian Stamp (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act I of 1905 [Local Authorities Loan (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto Ditto | In Nagri | 3 p (1 a) |
| Act II of 1905 [Indian Universities (Validation)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act III of 1905 (Indian Paper Currency) | In Urdu | 9 p (1 a) |
| Ditto | In Nagri | 9 p (1 a) |
| Act IV of 1905 (Indian Railway Board) | In Urdu | 3 p (1 a) |
| Act VI of 1905 (Court fees Amendment) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VII of 1905 (Bengal and Assam Laws) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Regulation I of 1890 (British Baluchistan Laws) | In Urdu | 2 a (1 a 9 p) |

as the majority of presumptions are rebuttable (a few only being irrebuttable where the law distinctly says so), that set forth in the clause (3) of section 201 must also be deemed to be rebuttable, even in the Revenue Court. This method of arriving at the intention of the Legislature is in my opinion utterly incorrect. The language of the whole section must receive due consideration and also other portions of the Act which bear upon the subject or throw any light upon it. Excepting those instances in which the Legislature has deemed fit to empower a Revenue Court to decide questions of title, that Court has no jurisdiction in such matters. Under section 199 of the Tenancy Act in suits and applications filed against a person alleged to be the plaintiff's tenant and in which the defendant pleads proprietary title in himself, the Revenue Court has power either to refer the defendant to a suit in the Civil Court (to be instituted within three months) for the determination of the question of title or to determine such question of title itself. In the latter case it has been held in *Beni Pande* v. *Raja Kausal Kishore Prasad Mal Bahadur* (1) and in other cases that such decision of the Revenue Court will operate as *res judicata* in respect of a subsequent suit in a Civil Court for determination of the same question.

In the case of suits under chapter XI, that is, suits between co-sharers in the zamindari, the Legislature has divided them into two classes, *first*, those in which the plaintiff is not recorded as having proprietary right entitling him to sue, and *secondly* those in which the plaintiff is recorded as having such proprietary right. In the former case it orders the court to proceed *mutatis mutandis* as directed in section 199, that is, it gives the Revenue Court power to go into and decide the question of title if it deems fit so to do. I take it such a decision, for the reasons given in the above mentioned case, would operate as *res judicata* in respect of a subsequent suit in a Civil Court for determination of the same question. The object of the Legislature in giving these powers to the Revenue Court was to avoid the multiplicity of suits which used to occur under the Rent Act of 1881. But in the latter case, that is, where the plaintiff is recorded as

(1) (1906) I. L. R. 29 All. 160.

court in the one set of condititions should be able to pass a final and binding decision, but not be able to do so in the other set of conditions. To allow the plaintiff and defendant to challenge Revenue Courts' decisions in the Civil Court would be an unnecessary multiplication of litigation, which the framers of the Act clearly desired to prevent. On the other hand one can understand why the Legislature allowed the defendant to go to the Civil Court when it directed the Revenue Court not to go behind the khewat. In one case it has allowed the plaintiff to demonstrate the errors of the khewat in the Revenue Court. In the other case it has allowed the defendant an opportunity of demonstrating the error, but in the Civil Court and not in the Revenue Court. It is unnecessary for me to discuss the motive which caused the Legislature to adopt a different course in the latter case, though it is easily intelligible to one who has had to deal with the correction and maintenance of revenue records.

It is argued that even where the plaintiff loses after a full trial on evidence under clause (3) he may bring a civil suit and raise the question again because the Revenue Court's decision is not final and binding. This would clearly be an unnecessary multiplication of suits as I have already pointed out.

It is next urged that if the presumption is conclusive so far as the Revenue Court is concerned, that court might have to pass a decree which it "knew" to be wrong. It is difficult to see how a court could know its decision to be wrong, when it could not take evidence to rebut the presumption. It could only know its decision to be wrong if it took into consideration facts not in evidence before it, which it is forbidden by law to do.

It is further contended that the words "shall presume" bear the same meaning as they bear under section 4 of the Indian Evidence Act and that there is no grave reason for interpreting these words as equivalent to "shall conclusively presume." In the first place, the meaning of "shall presume" in the Evidence Act is given to those words for the purposes of that Act alone. In the Revenue Act, III of 1901, sections 44, 57 and 84, wherever the words "shall presume" are used the Legislature added the words "until the contrary is proved." The same is the case in section 108 of the Tenancy Act. It is rather significant

As for clerical errors in the record they can be amended at any time by the Collector, and presumably the Revenue Court, trying the suit would allow a reasonable adjournment to enable the defendant to get the clerical error amended before it tried the suit, and if by that amendment the plaintiff's name were removed from the khewat the suit would fall under clause (1) of section 201, and the Revenue Court could then go into the question of title To allow the defendant to secure from the Collector an amendment of the khewat under powers granted to him by the Revenue Act, cannot in any way amount to the court seized of the suit going behind the khewat This to me appears to be a somewhat far fetched contention

As for the Hindu widow whose name is recorded for consolation, the revenue authorities I am sure want none of her They seek to secure the absolute correctness of the revenue records Orders for mutation are based primarily on actual possession If a Hindu widow were to ask a Revenue Court acting under the Revenue Act to record her name, openly admitting that she had no title and no possession, that court, I take it, would rightly refuse her request Those who have her name recorded for consolation usually do not openly state the true facts, and if they are privy to a wrong entry being made, the fault is theirs and they must take the consequence It is open, moreover, to any co-sharer or lambardar to call attention to the errors in the khewat and to secure amendments thereof, and the Legislature has attempted to force persons having title and possession to bring about the recording of their names in the record [*Vide* section 34 (5) of the Revenue Act] One of the chief objects of the Revenue Act is to secure accurate and full records of all rights in lands from which the Government draws so great a portion of its revenue It is unnecessary for me to labour the question any more There are other good grounds for holding the view which I take They are to be found in the well reasoned judgements of BANERJI and RICHARDS, JJ in *Bechan Singh* v *Karan Singh* (1) and I need not repeat them ; but I must point out that BANERJI J has explained that the present question was not discussed or argued in the case of

(1) (1908) I L R 30 All , 447

share of profits into two classes: first, those who are not recorded as having proprietary rights entitling them to institute a suit, and, secondly, plaintiffs who are recorded as having such proprietary rights. In the case of the first class, the court is empowered either to try the suit itself or to refer it to a Civil Court for trial, but in cases in which the plaintiffs are the recorded owners, the Revenue Court is the court to hear and determine the suit.

The contention on behalf of the respondent is that if a plaintiff is recorded as a co-sharer, the Revenue Court must on proof of this pass a decree in his favour and is not entitled to admit any rebutting evidence to show that the plaintiff has not any proprietary right. Now in the first place I may observe that if the Legislature intended that the presumption should be irrebuttable or conclusive nothing would have been simpler than to express its intention by inserting between the word "shall" and the word "presume," the word "conclusively". In section 9 of the Act we find where proof is to be deemed conclusive that the Legislature uses the words "conclusive proof." The word "presume" is well known among lawyers. A presumption is a logical assumption that a thing is true until disproved. We have different kinds of presumptions defined in the Evidence Act. The definition as given is by the words of the Act confined to the Act itself, but the Evidence Act is an Act of general application, it is a codification of the law of evidence intended to guide courts, and no doubt the framers of the Rent Act were fully aware of the meaning attributed by it to the word "presume". Section 4 of the Evidence Act runs as follows:—"Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved unless and until it is disproved, or may call for proof of it: Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. When one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it." This is not a definition contained in an Act merely, but it is the ordinary definition attributed to

affect the right of any person to establish by suit in the Civil Court that the plaintiff has not such proprietary right" A right to bring a suit in the Revenue Court for a share of profits by a co sharer is, as I have said, given by section 164 of the Act, which is included in chapter XI Section 201 provides for the procedure to be adopted in suits under that chapter It deals, as I have said, *with cases in which the plaintiff is not recorded as* having the proprietary right entitling him to institute the suit, and the defendant pleads that he has not such proprietary right, and cases in which the plaintiff is recorded as having such proprietary right In the first mentioned class of cases the procedure is laid down in section 199, and enables the Court either to require the defendant to institute a suit in the Civil Court for determination of the question of title, or to determine the question of title itself In the case of a suit by a plaintiff who is recorded as proprietor, the option is not given to the Court of requiring the institution of a suit in the Civil Court The Court is in this case bound to try the suit itself No reasons are assigned by the Legislature for giving the Court power in the one case to have the suit heard in the Civil Court and not in the other But if it is open to me to suggest a reason, it may be that the Legislature considered that where a plaintiff is the recorded proprietor, the court which has the control of the record of title and the registers is in a better position to investigate the claim of a person who is recorded than the Civil Court All changes or transactions affecting the registers prescribed by section 32 of the Land Revenue Act of 1901 are necessarily made by the revenue officers

The ground on which it is contended that the record is conclusive proof in the case of a recorded proprietor, is based, as I have said, solely on the *proviso* to the sub section This subsection appears to me in no way to countenance such a drastic construction of the word "presume" It appears to me that the Legislature having declared that there should be a presumption in favour of the recorded proprietor, introduced the *proviso* so that it should be clearly understood that the presumption should not in any way affect the right of any person to establish by suit in a Civil Court that the plaintiff has not the proprietary

apply merely to the defendant, but is as I have said, quite general It merely aims at safeguarding the interest of any person who may have title to the property

The same observation is applicable also to sections 44 and 57 of the Revenue Act The presumption thereby created is created without prejudice to the right of any person to establish his title in the Civil Court. It seems to me that it would be doing violence to the language of the sub section to interpret the expression "shall presume" as meaning "shall conclusively presume" If such a construction were accepted, the Revenue Court would in the case of suits by a recorded proprietor for a share of profits be deprived of its judicial functions, and be only so much machinery for recording decrees without investigating the merit of the case On production of the record showing the plaintiff to be a proprietor it would be bound to pass a decree in his favour and this too notwithstanding the fact that entries in the annual registers are merely presumed to be true until disproved It may be, to take examples that a person may have fraudulently or wrongfully procured the entry of his name as proprietor, or a name may have been wrongly inserted by mistake, and yet a person so recorded would be *entitled to a decree* for a share of profits and the Court would be powerless to inquire into and examine as to the true state of facts Then, if such a recorded co sharer did so obtain a decree for profits, the Civil Court could not interfere with the decree, inasmuch as the right to sue for profits is within the exclusive jurisdiction of the Revenue Court No doubt, any person aggrieved by such a decree can sue in the Civil Court and obtain a declaration of his title, but there is no provision whereby the Civil Court can reverse the decision of the Revenue Court in a suit for profits It is difficult to discover any good reason why the Legislature should withhold from the Revenue Court the power of deciding on its merits a suit in which the plaintiff is recorded as proprietor while it confers the power of doing so when the plaintiff is not a recorded proprietor

I now desire to refer to the authorities bearing upon this *question* The first case upon the subject came before my brother

SIR WILLIAM BURKITT and myself. We considered carefully the question, as also the judgements of the learned Judges who differed on it and came to the conclusion that the pre-umption enjoined by section 201 is not conclusive or irrebuttable. The consideration of section 201 came before my brothers Banerji and Aikman in the case of *Binwari Lal* v. *Nadar* (1) In that case the plaintiffs, who were recorded co sharers, sued another co-sharer for profits The defendant pleaded that the plaintiffs or their predecessors in title had not received profits within 12 years preceding the institution of the suit, and that the suit was time-barred It was held that it was not for the plaintiffs to prove by evidence of receipts of profits within 12 years that the right subsisted, and that section 201 of the Agra Tenancy Act raised a presumption in their favour. The learned Judges in their judgement say:—"We gather from the record that the plaintiffs are recorded co sharers, consequently the presumption referred to in the section arises in their favour, and it was not for them to prove by evidence of receipt of profits within 12 years that the right subsisted. It was for the defendant to rebut the presumption which the law raised in the plaintiffs' favour." If the presumption was irrebuttable, it is obvious that the language here used is erroneous and misleading. Up to this date we have the decisions of KNOX and BURKITT, JJ., and myself supported by the views of BANERJI and AIKMAN, JJ., expressed in the case to which I have just referred in favour of the view that the presumption enjoined by section 201 is not conclusive, and as against these, we have the dissenting opinion of my brother Richards.

The matter, however, was not allowed to rest here. The point came up before my brothers BANERJI and RICHARDS in the case of *Bechan Singh* v. *Karan Singh* (2) They dissented from the decision in *Dil Kunwar* v. *Udai Ram*. BANERJI, J., referring to the judgement delivered by himself and AIKMAN, J., in *Binwari Lal* observed, in regard to the words "it was for the defendant to rebut the presumption the law raised in the plaintiff's favour," that this was an *obiter dictum*: and he further said:—"However, on full consideration I think it was

(1) (1903) I. L. R., 23 All., 153. (2) (1908) I. L. R., 30 All., 447.

cannot be deemed to be irrebuttable If a decree is admitted in evidence, there must necessarily also be evidence as to the identity of the parties to it This is wholly inconsistent with the notion that the words "shall presume" mean "shall conclusively presume" The decisions of the Full Bench in the cases to which I have lastly referred logically, I think, establish that the presumption is not a conclusive or irrebuttable presumption Otherwise we shall be introducing into our legal vocabulary a hybrid presumption, a presumption which will be rebuttable by proof of a decree of a Civil Court inconsistent with it, but otherwise will be irrebuttable The argument of Mr *Surendra Nath Sen* was precise, clear and cogent, and it carried to my mind conviction. I am still of opinion that the earlier decisions to which I have referred are correct, and I would therefore allow this appeal.

1910

WAZIR ALI KHAN v. PARBATI NARAIN.

GRIFFIN, J —I have little to add to what has fallen from the learned Chief Justice The Agra Tenancy Act contains no definition of the expression "shall presume" The words should be understood in the sense they are defined in the Evidence Act, and as they are ordinarily understood. By doing so we shall give to the entries in the record of rights the probative value assigned to them by sections 44 and 57 of the Revenue Act With the words "shall presume" so understood, the effect of section 201 of the Tenancy Act is to cast on the defendant the burden of disproving the plaintiff's title when the latter produces an entry in the revenue records as evidence of his title If the defendant adduces evidence, but fails to satisfy the Revenue Court that the plaintiff has no title, then, under the *proviso* immediately following, the defendant or any other person is entitled to go to the Civil Court and ask for a declaration that the plaintiff has no title The first clause of section 201 provides that the Revenue Court may inquire into a question of title in a case where the plaintiff is not recorded as having a proprietary right entitling him to institute the suit under chapter XI of the Tenancy Act Clause (3) is silent on this point It is therefore contended that the Revenue Court has no jurisdiction to inquire into disputes when the plaintiff is recorded as having title. This argument in my opinion begs the question. If the words "shall presume"

cannot be deemed to be irrebuttable If a [illegible] ted in evidence, there must necessarily also be [illegible] the identity of the parties to it This is wholly [illegible] with the notion that the words "shall presume" [illegible] conclusively presume" The decisions of the Full Bench [illegible] cases to which I have lastly referred logically, I think, [illegible] that the presumption is not a conclusive or irrebuttable presumption Otherwise we shall be introducing into our legal [illegible] ary a hybrid presumption, a presumption which will be rebuttable by proof of a decree of a Civil Court inconsistent with it, but otherwise will be irrebuttable The argument of Mr. *Surendra Nath Sen* was precise, clear and cogent, and it carried to my mind conviction I am still of opinion that the earlier decisions to which I have referred are correct, and I would therefore allow this appeal.

GRIFFIN, J —I have little to add to what has fallen from the learned Chief Justice The Agra Tenancy Act contains no definition of the expression "shall presume" The words should be understood in the sense they are defined in the Evidence Act, and as they are ordinarily understood. By doing so we shall give to the entries in the record of rights the probative value assigned to them by sections 44 and 57 of the Revenue Act With the words "shall presume" so understood, the effect of section 201 of the Tenancy Act is to cast on the defendant the burden of disproving the plaintiff's title when the latter produces an entry in the revenue records as evidence of his title If the defendant adduces evidence, but fails to satisfy the Revenue Court that the plaintiff has no title, then, under the *proviso* immediately following, the defendant or any other person is entitled to go to the Civil Court and ask for a declaration that the plaintiff has no title The first clause of section 201 provides that the Revenue Court may inquire into a question of title in a case where the plaintiff is not recorded as having a proprietary right entitling him to institute the suit under chapter XI of the Tenancy Act Clause (3) is silent on this point It is therefore contended that the Revenue Court has no jurisdiction to inquire into disputes when the plaintiff is recorded as having title. This argument in my opinion begs the question. If the words "shall presume"

instead of at the higher rate Interest had not been paid punctually, and the court of first instance (Subordinate Judge of Bareilly) accordingly gave a decree for the higher rate The defendant appealed to the High Court, the only plea raised being that the provision as to interest referred to above was in the nature of a penalty and should be disallowed

Maulvi *Ghulam Mujtaba*, for the appellants.

Maulvi *Muhammad Ishaq*, for the respondent.

STANLEY, C J —The only question pressed before us in this appeal is concerned with the rate of interest chargeable to the defendants appellants The suit was one to raise the amount due on foot of a mortgage of the 14th of August, 1900, by sale, if necessary, of the mortgaged property In the mortgage the mortgagor admitted that he had borrowed Rs 3 000 from the plaintiff with interest at the rate of Rs 2 per cent per mensem, and he promised to make payment on demand Then follows a provision that if the annual interest be paid to the mortgagee at the end of the year, the rate of interest will be reduced to Rs 1 4-0 per cent per mensem, but that if the mortgagor fail to pay the interest at the end of the year, interest at the rate of Rs 2 per cent per mensem will be added to the principal and compound interest be paid at that rate.

The interest not having been punctually paid, the court below gave a decree for the higher rate of interest

It is contended by the learned vakil for the appellants that the court was wrong in awarding the higher rate of interest inasmuch as it was in the nature of a penalty It appears to me that this contention is not well founded According to the English authorities it is well settled that if a mortgagee stipulate for a higher rate of interest in default of punctual payment he must reserve the higher rate as the interest payable under the mortgage and provide for its reduction in case of punctual payment, and if he do so he will be entitled to recover the higher rate But he cannot effect his object by reserving the lower rate and then fixing a higher rate in case of non payment of the lower rate at the appointed time, such an agreement being considered in equity as in the nature of a penalty This rule is not altogether intelligible JESSEL, M R, said of

# MISCELLANEOUS CRIMINAL.

1910
February 25.

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain*

EMPEROR v. WAJID HUSAIN AND OTHERS *

*Act No XLV of 1860 (Indian Penal Code), section 76—Act No I of 1872 (Indian Evidence Act) section 105—Question whether act done by accused falls within general exceptions—Evidence—Presumption—Pleadings*

Where an accused person has raised pleas inconsistent with a defence which would bring his case within one of the general exceptions in the Indian Penal Code, he cannot in appeal set up a case based upon the evidence taken at his trial, that his act came within such general exception Circumstances which would bring the case of an accused person within any of the general exceptions in the Indian Penal Code can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record but there must be evidence upon which such circumstances can be found to exist and when they are not shown to exist the Court is not competent to assume, more particularly when the pleas taken are inconsistent with such assumption that such circumstances might have existed or that doubt may arise in consequence of such assumption and the accused ought to be given the benefit of the doubt *Queen Empress v Timmal* (1) referred to

THIS was a reference made by the Judicial Commissioner and the Additional Judicial Commissioner, Lucknow, under section 9, clause (*b*) of Act No XIV of 1891, for the determination of the question as to whether for the reasons given in the judgement, the appellants should be acquitted or their appeals dismissed The circumstances which gave rise to the reference appear from the order of the High Court thereon

Babu *M M. Ghoshal, Government Pleader Lucknow*, for the Crown

KNOX and KARAMAT HUSAIN, JJ —Eleven persons were convicted by the Additional Sessions Judge of Gonda of various offences falling under sections 195, 196, 211 and 218 of the Indian Penal Code They appealed to the Court of the Judicial Commissioner of Oudh. The appeal was heard before the Judicial Commissioner and the Additional Judicial Commissioner sitting together. There was a difference of opinion between the members of the Court regarding the guilt of seven of the appellants, viz, Wajid Husain, Muhammad Hashim, Najab Ali, Ghaus Ali, Ram Kuber, Mata Din and Lachman In consequence of this the

* Criminal Reference No 18 of 1910

(1) (1898) I L R 21 All 122

1910

GHAZANFAR ALI KHAN v. KANIZ FATIMA.

property including the 8-anna share of the village in suit. Kubra Bibi died in February, 1901, leaving a daughter named Kaniz Fatima, who married one Raza Husain, and they were the defendants in the suit, which was brought on 12th March, 1902.

The main defence was that the plaintiff was not legitimate, and that raised the only issue for decision in this appeal.

The Subordinate Judge on that issue said—

"I am clear that Musammat Phundan was a public prostitute. I cannot believe for a moment that a man of the position and means of Muzaffar Ali Khan finding himself childless from his *biradari* wedded wife Zohra, took it into his head to propose to a prostitute or the daughter of a prostitute or a pimp hoping by the alliance to beget children. It is in this country proverbial that prostitutes are averse to beget children as it hinders their nasty avocation. There is nothing on record to show that Chaudhri Muzaffar Ali, Khanzada, was reduced to such a state as far as his personality, age, health and means were concerned, that no khanzada or other gentleman in the country would have offered him his daughter or sister for a wife. The strongest presumption is that he saw her dancing somewhere, became enamoured of her and took her for his concubine or wife. Now the only thing to be seen is whether it was in the capacity of a concubine or that of a wife that he took her. I am inclined to believe that it was in the capacity of a wife that he took her."

He therefore held that the plaintiff was the legitimate son of Muzaffar Ali Khan, and made a decree in his favour.

The case on appeal to the Court of the Judicial Commissioner came before MR. E. CHAMIER (Officiating Judicial Commissioner) and MR L. G. EVANS (First Additional Judicial Commissioner) whose judgement as to the plaintiff's legitimacy, *after* citing the passage from the Subordinate Judge's judgement given above, continued:—

"The learned Subordinate Judge then goes on to say that Muzaffar Ali Khan took her as his wife because it is found that she consented to the seclusion of the *parda* and that there is evidence of certain witnesses that Muzaffar Ali Khan admitted that Phundan was his wife and on one occasion on the 20th April, 1883, Muzaffar Ali Khan deposed in a court that he had a second wife who came from a family of prostitutes and he could have alluded to no one else except Musammat Phundan. He has also found that two of the daughters were married into respectable families, and it must, therefore, be presumed that Muzaffar Ali Khan considered them to be his legitimate daughters.

"The learned pleader for the defendants has contended that although there is a general presumption in favour of legitimacy amongst respectable people, yet as it is admitted that Musammat Phundan was in the first instance a prostitute, there is no presumption that the cohabitation between Muzaffar Ali Khan and

# MISCELLANEOUS CRIMINAL

1910
*February 25*

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain*

EMPEROR v WAJID HUSAIN AND OTHERS *

*Act No XLV of* 1860 *(Indian Penal Code), section* 76—*Act No* 1 *of* 1872 *(Indian Evidence Act) section* 105—*Question whether act done by accused falls within general exceptions—Evidence—Presumption—Pleadings*

Where an accused person has raised pleas inconsistent with a defence which would bring his case within one of the general exceptions in the Indian Penal Code he cannot, in appeal set up a case based upon the evidence taken at his trial, that his act came within such general exception Circumstances which would bring the case of an accused person within any of the general exceptions in the Indian Penal Code can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record but there must be evidence upon which such circumstances can be found to exist and when they are not shown to exist the Court is not competent to assume more particularly when the pleas taken are inconsistent with such assumption that such circumstances might have existed or that doubt may arise in consequence of such assumption and the accused ought to be given the benefit of the doubt *Queen Empress* v *Timmal* (1) referred to

THIS was a reference made by the Judicial Commissioner and the Additional Judicial Commissioner, Lucknow, under section 9, clause (*b*) of Act No XIV of 1891, for the determination of the question as to whether for the reasons given in the judgement, the appellants should be acquitted or their appeals dismissed The circumstances which gave rise to the reference appear from the order of the High Court thereon

Babu *M M. Ghoshal, Government Pleader. Lucknow,* for the Crown

KNOX and KARAMAT HUSAIN, JJ.—Eleven persons were convicted by the Additional Sessions Judge of Gonda of various offences falling under sections 195, 196, 211 and 218 of the Indian Penal Code They appealed to the Court of the Judicial Commissioner of Oudh. The appeal was heard before the Judicial Commissioner and the Additional Judicial Commissioner sitting together. There was a difference of opinion between the members of the Court regarding the guilt of seven of the appellants, viz, Wajid Husain, Muhammad Hashim, Najab Ali, Ghaus Ali, Ram Kuber, Mata Din and Lachman In consequence of this the

* Criminal Reference No 18 of 1910

(1) (1898) I. L R, 21 All 122

1910

GHAZANFAR ALI KHAN v KANIZ FATIMA

one-eighth in the whole estate, a share which has never been demanded by her up to date It is true that her son Ghazanfar Ali has been in possession of the bulk of the property since 1890 and this may account for the fact that Musammat Phundan has never claimed her share as the legal widow of the deceased but it is a significant fact that she has never attempted since her alleged husband's death to be placed in such a position that her status as his legal widow would be no longer a subject of controversy

"The above considerations lead to the conclusion that in spite of the fact that there may be a presumption of legitimacy owing to the admitted fact that Muzaffar Ali Khan and Musammat Phundan cohabited together as man and wife from about 1875 to 1890 and that Muzaffar Ali Khan had on several occasions acknowledged Musammat Phundan as his wife yet there is absolutely no reliable evidence of any kind of the celebration of any legal marriage in 18[illegible]0 and for reasons given above there is every ground for believing that cohabitation between Muzaffar Ali Khan and Musammat Phundan did not as a matter of fact commence before 1875 I would therefore decide that Ghazanfar Ali Khan is not proved to be the legitimate son of the deceased and his suit to recover possession of the share in Bambhauri should have been dismissed"

The appeal was therefore allowed and the suit dismissed

On this appeal—

*Ross* and *B Dube*, for the appellant contended that the appellate court in India had wrongly decided that the appellant was not proved to be the legitimate son of his father Muzaffar Ali Khan and Musammat Phundan, and that on the evidence and circumstances of the case a presumption could under the Muhammadan Law be drawn that he was a legitimate son without actual or direct proof of the marriage of his parents Such circumstances were the prolonged cohabitation between them, instance of acknowledgement by Muzaffar Ali Khan of Musammat Phundan as his wife, and the fact that two of Muzaffar Ali Khan's daughters also born to him of Musammat Phundan had been married to respectable men with all due ceremonies and might therefore be presumed to be his legitimate offspring Reference was made to *Khaja Hidayut Oollah* v *Rai Jan Khanum* (1), *Mahomed Bauker Hossain Khan* v *Shurfoon Nissa Begum* (2) *Ashrufood Dowlah Ahmed Hossein Khan* v *Hyder Hossein Khan* (3), *Mussumat Jariut-ool Butool* v *Hoseinee Begum* (4) *Khajoor-oon-nissa* v *Rowshan Jehan* (5), *Mahammad Azmat Ali*

(1) (1841) 3 Moo I A 295
(2) (1850) 5 Moo I A 136 (150)
(3) (1866) 11 Moo I A 94
(4) (1867) 11 Moo I A 194
(5) (1876) I L R [illegible] Calc 184 (200) L R 3 I A 291 (311)

1910

Emperor v. Wajid Husain

The case therefore appears to resolve itself into a finding by both the members of the Oudh Court that the seven accused persons did commit acts amounting to the offences charged against them, but that it must be assumed that they acted as they did in obedience to the orders of a superior authority, and that the benefit of the general exceptions contained in section 76 of the Indian Penal Code, should be given in their favour If the benefit of the exception can be given them, the acts committed by them would cease to be offences punishable under the Indian Penal Code, those acts being taken out of the category of offences in that Code by reason of section 76 of the said Code

We have therefore not considered it necessary to go into the general evidence contained in the record of the case We have only considered (1) the statements made by the accused and by the witnesses produced by them, (2) such portions of the record as have been brought to our notice by the learned officer of the Oudh Court who has been permitted to address us and to prosecute the reference

Section 105 of the Indian Evidence Act, lays down that "when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code is upon him and the Court shall presume the absence of such circumstances" In the present case, therefore, it was for the seven accused persons to prove the existence of circumstances bringing their cases within the general exception contained in section 76 of the Indian Penal Code It was for them to prove that such acts and circumstances existed as would show that they were not liable to be convicted of the offences with which they had been charged, in other words, it was for them to show that there were orders given to them by persons in authority over them, and that all that they did was merely to carry out their duties as subordinates in obeying such orders In the case provided for by section 105, Evidence Act, this is all the more necessary, inasmuch as that section requires the Court to presume the absence of such circumstances All the accused were defended on their trial by pleaders of the Fyzabad Court We have, as we have stated

1910

GHAZANFAR ALI KHAN v. KANIZ FATIMA

appellant there is no dispute, and of all the questions raised in the case, one only remains for consideration on the present appeal, and that is whether the appellant is to be regarded as the legitimate son of his father On this question the Subordinate Judge decided in the appellant s favour, but he was overruled by the Court of the Judicial Commissioner

Their Lordships are of opinion that the learned Judges of that Court were right

It may be stated at once that the sole question is, whether on the evidence in the case, coupled with all legitimate presumptions, it is shown that the appellant was born in wedlock No question has been raised either in India or before Their Lordships—such has been raised in many cases—as to any possible legitimation by subsequent acknowledgement or treatment

There was no evidence of marriage between the parents of the appellant

The learned Judges fully recognised that prolonged cohabitation might give rise to a presumption of marriage, but that presumption is not necessarily a strong one, and Their Lordships agree that it does not apply in the present case, for the mother before she was brought to the father's house was, according to the case on both sides, a prostitute

The learned Judges next notice certain instances in which the deceased father is said to have acknowledged the mother as his wife, but the effect of such acknowledgement has been rightly estimated by the learned Judges

The next point relied upon by the appellant was that two of his sisters, whose legitimacy was as much open to question as his own, were married to respectable men, and the marriages conducted with due formalities This is a point worthy of consideration, but it would be easy to attribute too much weight to it

Their Lordships are of opinion that the decision of the Judicial Commissioner's Court was right They will humbly advise His Majesty that this appeal should be dismissed

The appellant will bear the costs

*Appeal dismissed*

Solicitors for the appellant —*Barrow, Rogers and Nevill*

Solicitors for the respondents —*T L. Wilson & Co*

J V W.

called upon to produce them The whole tenor of the defence so far as can be gathered from the examinations recorded, was to the effect that there had been a dacoity, that all the persons who had been arrested were the genuine people concerned in that dacoity and not people caught and kept beforehand to be produced as persons who had taken part in a sham dacoity It may be safely said that in the case before us none of the accused persons have in their defence proved the existence of circumstances bringing their cases within section 76 of the Indian Penal Code We have gone into the pleas taken in appeal, but it must always be remembered that this Court has held in *Queen Empress* v *Timmal* (1) that where an accused person has raised pleas inconsistent with a defence which would bring his case within one of the general exceptions in the Indian Penal Code, he can not, in appeal, set up a case upon the evidence taken at his trial, that his act came within such general exception While we agree with what was laid down in *Queen Empress* v *Timmal*, we also hold that circumstances which would bring the case of an accused person within any of the general exceptions in the Indian Penal Code can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record, but there must be evidence upon which such circumstances can be found to exist, and when they are not shown to exist, the Court, which is under section 105 of the Evidence Act, bound to presume the absence of such circumstances, is not competent to assume, more particularly, when, as in this case, the pleas taken are inconsistent with such assumption that such circumstances might have existed or that doubt may arise in consequence of such assumption, and that the accused must be given the benefit of such doubt Section 105 of the Evidence Act, in using the words "shall presume the absence of such circumstances" requires the Court to regard such absence as proved unless and until it is disproved *vide* section 4 of the Evidence Act, 1872 In saying this we do not overlook the provisions of section 114 of the same Act In an ordinary criminal trial the Court undoubtedly may and should presume the existence of facts which it thinks likely to have happened, having regard to the common course of natural events and human

(1) (1893) I. L. R, 21 All., 122.

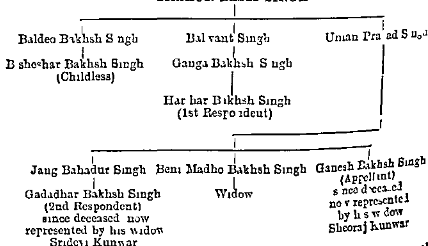
1910

SHEORAJ KUNWAR v. HARIHAR BAKHSH SINGH

APPEAL from a judgement and decree (8th August 1906) of the court of the Judicial Commissioner of Oudh, which reversed a judgement and decree (16th January 1905) of the court of the Subordinate Judge of Sitapur

This appeal arose out of a suit for pre-emption brought by Ganesh Bakhsh Singh the husband of the present appellant, and the question for decision on the appeal was whether the appellant has a right of pre-emption in regard to three villages Baunabhari, Jajjour, and Mau, and to pattis or parts of villages named Kathwa and Himmatnagar, all of which formed part of a taluqa or estate called Sarauia

The following pedigree makes the statement of facts and the relationship of the parties more intelligible —




The second Summary Settlement of taluqa Sarauia after the confiscation of proprietary rights in Oudh, was made with Ganga Bakhsh Singh as taluqdar At the regular settlement Bisheshar Bakhsh Singh and Uman Prasad Singh claimed shares in the taluqa, and the disputes were settled by a compromise by which Ganga Bakhsh Singh was to remain the taluqdar, whilst Bisheshar Bakhsh Singh and Uman Prasad Singh were each to remain in possession of one quarter of the estate, as under-proprietors, paying to the taluqdar the Government revenue assessed on the villages comprised in their shares, and in addition 10 per cent of the Government revenue On 6th May, 1861, the Settlement Court made a decree in accordance with that compromise, and, on 11th December, 1861, allotted to each party specific villages

by no means an easy one, viz, how far a subordinate is justified in carrying out the orders of a superior officer which he knows to be illegal, and how far he can set up such obedience as an answer to an act required of him which he knows to be a criminal act So far as we can see and with all respect to the learned Commissioners that question does not arise for determination in the case The question referred to us is therefore thus decided —We hold that, on the evidence upon the record, it cannot be assumed in favour of the constables that they acted under the orders of the Inspector and Sub-Inspectors It was for the accused and the learned counsel who appeared for them definitely to set forth that they did so, and to prove both the orders and that their action was in obedience to such orders They have not laid even this foundation for the question which appears to us to lie beyond It is perhaps not too much to assume that the counsel who appeared for the accused saw great difficulty in proving the existence of such circumstances from the record and thought it prudent to ignore the point The acts found upon the record are offences They are not shown to be taken out of the category of offences by any general or special exceptions The benefit of any assumption that the accused or any of them acted as they did in obedience to orders from superior authority can and may well be given in the sentences that may be awarded This is our answer to the question, and we direct that it be transmitted to the Judicial Commissioner under the signature of our Registrar in conformity with the provisions of section 10 of Act No XIV of 1891

1910

SHEORAJ KUNWAR v. HARIHAR BAKHSH SINGH

As to that the Subordinate Judge held that the three villages constituted under the circumstances of the case "one mahal within the meaning of section 4 of Act III of 1901," an Act to consolidate and amend the law relating to land revenue in the North-Western Provinces and Oudh. "The plaintiff" therefore, "being a co-sharer of the whole mahal, and a nearer relation of the vendor, has a preferential right to purchase under section 9 of Act XVIII of 1876 (The Oudh Laws Act)." As to the two pattis the Subordinate Judge said :—" They are clearly sub-divisions of the same under-proprietary tenure and form one mahal with the rest of the property; in respect of these two pattis no separate record of right has been prepared, and, in my opinion, the plaintiff's pre-emptive right in these two pattis is unassailable."

From that decision Harihar Bakhsh Singh appealed to the Court of the Judicial Commissioner. That Court (Mr W. F. WELLS, Additional Judicial Commissioner and Mr. E. CHAMIER, officiating Judicial Commissioner) differed in opinion, the former being in favour of dismissing the appeal and the latter for allowing it

MR WELLS (after referring to the contention for Harihar Bakhsh Singh "that there can be no such thing as an under proprietary mahal because there is no separate engagement made with the under-proprietors for payment of revenue, and that under-proprietors do not pay revenue but rent") continued :—

"This view does not commend itself to me Section 100 of Act XVII of 1876 made a distinct provision for the partition of taluqdari and under proprietary mahals and mahals held by lessees whose rent has been fixed by the Settlement Officer, so that the term 'mahal' must clearly have had a wider interpretation than is given it in section 4 of Act III of 1901

"Section 138 of Act III of 1901 also provides for the partition of under proprietary mahals, the wording being nearly the same as that of section 100 of Act XVII of 1876 Under section 7 of Act XVIII of 1876 a right of pre-emption exists in under proprietary communities, however constituted The reference in section 7 to section 40 is not very satisfactorily worded, but it would seem to imply that the right of pre-emption accrued to all under proprietors in a mahal and to all holders of heritable and non transferable leases

"In the present case what seems to have been effected by the partition made by Harihar Bakhsh was a sort of imperfect partition by which separate villages were assigned to Ganesh Bakhsh and Gajadhar, but both remained jointly responsible for the payment to the taluqdar. That payment was of the nature

1910

RAM PRASAD BHAGAT v. SUBA RAI

then brought an action in the court of the Assistant Collector of the first class for the adjudication of the price of jasmine and *bela* and claimed Rs 572 The Assistant Collector decreed the suit for the full amount claimed There was an appeal to the District Judge, on the ground that the amount awarded was excessive The learned District Judge varied the decree of the Assistant Collector by reducing the amount from Rs 572 to Rs 125 with proportionate costs The reason which led the learned District Judge to vary the decree of the court of first instance is that the plaintiff under section 76, clause (1) of the Agra Tenancy Act is entitled to the price of the " crops or other products " which, according to the local inquiry held by the Assistant Collector, amounted to Rs 125, and is not entitled to the price of *bela* and jasmine plants The plaintiff has preferred a second appeal to this Court, and it is contended by his learned counsel that the expression " crops or other products " includes the jasmine and *bela* plants In support of his contention he cites a ruling of the Board of Revenue in *Abdul Baki* v *Mathura Prasad* (1)

" The learned vakil for the respondents in answer to this contention relies on the case of *Sheo Pershad Tewary* v *Mussumat Moleema Beebee* (2), in which it was held that the term ' produce of land " referred to in Act X of 1859 means that which can be gathered and stored, crops of the nature of cereal or grass or fruit crops , and that it does not apply to the trees from which the crops, if fruit crops, are gathered The point is an important one and of general application. It is therefore desirable to have a ruling of a Division Bench of this Court. I therefore refer this case to a Bench of two Judges "

The appeal was then re argued before a Division Bench.

Maulvi *Muhammad Ishaq*, for the appellant, relied on *Abdul Baki* v. *Mathura Prasad* (1).

Munshi *Govind Prasad*, for the respondent, relied on *Sheo Pershad Tewary* v *Mussumat Moleema Beebee* (2)

GRIFFIN and TUDBALL, JJ :—The facts of the case are sufficiently set forth in the order of reference of our learned brother. We have been referred to the ruling *Sheo Pershad Tewary* v *Mussumat Moleema Beebee* (2) The case before the Court was one of distraint, and the question for decision was whether, having reference to the provisions of sections 115 and 118 of Act X of 1859, guava trees came within the category of standing crops or other ungathered products The decision of the court was to the effect that the term " products of the land " must be construed as equivalent to that which can be gathered or stored, crops of the nature of cereal or grass or fruit crops, and it did not apply to the trees from which the crops are gathered. In this view the Court held that the zamindar was

(1) Weekly Notes 1893, p. 24. (2) (1869) N-W. P , H C Rep , 108

1910

SHEORAJ KUNWAR v. HARIHAR BAKHSH SINGH

As to that the Subordinate Judge held that the three villages constituted under the circumstances of the case "one mahal within the meaning of section 4 of Act III of 1901," an Act to consolidate and amend the law relating to land revenue in the North-Western Provinces and Oudh "The plaintiff" therefore "being a co-sharer of the whole mahal, and a nearer relation of the vendor, has a preferential right to purchase under section 8 of Act XVIII of 1876 (The Oudh Laws Act)" As to the two pattis the Subordinate Judge said —"They are clearly sub-divisions of the same under-proprietary tenure and form one mahal with the rest of the property; in respect of the two pattis no separate record of right has been prepared, and, in my opinion, the plaintiff's pre-emptive right in these two pattis is unassailable"

From that decision Harihar Bakhsh Singh appealed to the Court of the Judicial Commissioner That Court (Mr W F WELLS, Additional Judicial Commissioner and Mr E CHAMIER, officiating Judicial Commissioner) differed in opinion, the former being in favour of dismissing the appeal and the latter for allowing it

MR WELLS (after referring to the contention for Harihar Bakhsh Singh "that there can be no such thing as an under proprietary mahal because there is no separate engagement made with the under proprietors for payment of revenue, and that under-proprietors do not pay revenue but rent") continued —

"This view does not commend itself to me Section 100 of Act XVII of 1876 made a distinct provision for the partition of taluqdari and under proprietary mahals and mahals held by lessees whose rent has been fixed by the Settlement Officer, so that the term 'mahal' must clearly have had a wider interpretation than is given it in section 4 of Act III of 1901

"Section 138 of Act III of 1901 also provides for the partition of under proprietary mahals the wording being nearly the same as that of section 100 of Act XVII of 1876 Under section 7 of Act XVIII of 1876 a right of pre-emption exists in under proprietary communities however constituted. The reference in section 7 to section 10 is not very satisfactorily worded, but it would seem to imply that the right of pre-emption accrued to all under proprietors in a mahal and to all holders of heritable and non transferable leases

"In the present case what seems to have been effected by the partition made by Harihar Bakhsh was a sort of imperfect partition by which separate villages were assigned to Ganesh Bakhsh and Gajadhar but both remained jointly responsible for the payment to the taluqdar That payment was of the nature

1910

RAM PRASAT BHAGAT v. SUBA RAI

language of sections 74, 75 and 76 is much wider than the language of the corresponding section in the Rent Act, XII of 1881, and that plants such as 'jasmine and bela' are included in the expression 'other products'

The court below has not come to any finding as to the value of the plants themselves It is therefore necessary to remit an issue under the provisions of order 41, rule 25, Civil Procedure Code, for a finding as to the value of the plants.

We may here note that the defendants did in the written statement contest the right of the plaintiff to recover compensation for the plants

No further evidence need be taken Ten days will be allowed for objections on the return of the findings.

*Issues remitted*

1910

Sheoraj Kunwar
v
Harihar Bakhsh Singh

the Act, but the word is a term of the Revenue Law and as the Oudh Laws Act 1876, and the Oudh Land Revenue Act were passed on the same day and refer to each other, it is permissible to refer to the latter Act (but not to the present Act passed in 1901) in order to ascertain the meaning of the word mahal in the Oudh Laws Act In this connection I may refer to the judgement of Their Lordships in the case of *Mannu Lal* v *Muhammad Ismail* (1) Chapter V of the Revenue Act of 1876 shows that the word 'mahal' means any parcel or parcels of land which have been separately assessed to or are held under a separate engagement for the Revenue and for which a separate record of rights has been prepared and this is the sense in which the word has been used by revenue and judicial officers since the first regular settlement of the Province, see Thomason's Directions to Revenue Officers which was the guide book of officers engaged in that settlement and also *Durga Singh* v *Dalip Singh*, and (2) *Samain Ali* v *Ram Parshad* (3) Each mauza or village is as a general rule a separate mahal, but a mahal may consist of two or more mauzas or parts of mauzas or of only a portion of one mauza It is clear that the villages assigned to Uman Prasad did not form a separate mahal in the ordinary sense The *kabuliat* of the taluqa in which they are included a copy of which is on the record shows that each village in the taluqa was separately assessed to revenue and that the taluqdar entered into one engagement for the payment of the revenue on all the villages The whole taluqa is therefore, what is called in the Revenue Act a *taluqdari* mahal consisting of a large number of villages each of which is separately assessed to revenue and may be regarded as an inferior mahal (see section 100(a) of the Revenue Act of 1876) The plaintiff is certainly not a co-sharer in the *taluqdari* mahal for the taluqdar has no co-sharer Nor as I have already pointed out is the plaintiff a co-sharer in any of the inferior mahals just referred to of which the taluqa is made up

"But the plaintiff contends that the villages assigned to Uman Prasad constituted together an under proprietary mahal of the kind referred to in sections 100 and 101 of the Act If he can make good this contention, he must succeed for the partition which has taken place being of the nature of an imperfect partition has left him a co sharer of the first defendant Gadadhar Bakhsh in the whole mahal An under proprietor though holding what is called a sub-settlement pays rent not revenue His name used to be entered in Register No 4, not in Register No 2 or Register No 3 kept up under section 56 of the Act of 1876, now replaced by section 32 of the Act of 1901 Therefore when the Act speaks of an under proprietary mahal it must I think, mean a parcel or parcels of land separately assessed to revenue the holder or holders of which is or are liable for the rent as a whole

"The agreement of May, 18 1 on which the settlement decree is based shows that after the regular settlement, Uman Prasad was to pay to the taluqdar the revenue assessed on his villages plus a *malikana* of 10 per cent., but there is nothing to show that the liability for the rent of all the villages was to be one and undivided so that if Uman Prasad sold a single village to another person

(1) (1901) I L R 23 All 574 L. R., 31 I. A 12

(2) (1895) 1 Oudh Cases 45

(3) (1901) 4 Oudh Cases, 305

language of sections 74, 75 and 76 is much wider than the language of the corresponding section in the Rent Act, XII of 1881, and that plants such as 'jasmine and bela' are included in the expression 'other products'.

1910

RAM PRASAD BHAGAT v. SUBA RAI.

The court below has not come to any finding as to the value of the plants themselves. It is therefore necessary to remit an issue under the provisions of order 41, rule 25, Civil Procedure Code, for a finding as to the value of the plants.

We may here note that the defendants did in the written statement contest the right of the plaintiff to recover compensation for the plants.

No further evidence need be taken. Ten days will be allowed for objections on the return of the findings.

*Issues remitted.*

1910

SHEORAJ KUNWAR v. HARIHAR BAKHSH SINGH.

can be defined according to Chapter 5 of the Revenue Act of 1876 as a parcel or parcels of land separately assessed to or held under a separate engagement for revenue' A taluqdari mahal consists of a number of such mahals with respect to which the taluqdar has entered into one engagement for the payment of revenue for all the inferior mahals contained therein. If there were two taluqdars owing equal shares in the taluqa they would be jointly responsible for the revenue assessed upon such mahal

"Similarly the learned counsel for the plaintiff contends that an under proprietary mahal means a mahal in which the under proprietors are jointly liable to the taluqdar for rent It has been judicially decided that Ganesh and Gadadhar are jointly liable for the rent of all villages held by them in under proprietary tenure to the taluqdar Harihar Bakhsh Singh Therefore if one of these sells a village or part of a village to a third party, that third party is placed in exactly the same position as the vendor and is jointly responsible with him and the remaining co-sharers to the taluqdar for rent payable for all the villages held under the under proprietary tenure, that is to say, whatever the liability is under which the under-proprietors hold these villages it is one which cannot be extinguished by any contract with a third party The learned counsel also contends that just as an imperfect partition of a proprietary mahal means a division of such mahal into two or more portions *jointly responsible for the revenue assessed on the whole mahal*, so in this case, where it is practically conceded that the partition effected between the under proprietors is in the nature of an imperfect partition and each under proprietor is jointly responsible with the other to the taluqdar for the rent payable on the villages as a whole, all the property held by the under-proprietors must be considered to be one under proprietary mahal within the meaning of the second clause of section 9, Act XVIII of 1876 It seems to me impossible to go with the learned counsel as far as he contends It is true that the meaning of the word 'mahal' can be extended in the case of a *taluqdari* mahal to a number of inferior mahals for which the taluqdar has given one engagement to Government for revenue, but if the contention of the learned counsel is carried to its logical conclusion, it follows that in a case where several under proprietors are jointly responsible for the rent of a number of villages to one taluqdar and a share in one village only is sold by one under proprietor to a third party, such third party would by the purchase become a co-sharer in all the villages held by the under proprietors and be thereby entitled to pre empt with respect to any of the other villages held in under proprietary tenure in preference to the taluqdar, even though such third party be an absolute stranger and not related in any way either to the under proprietors or the taluqdar I feel that I am unable to make the assumption the learned counsel asks me to make with respect to the joint liability of the purchaser, as contended by him in the event of any village or portion of a village being sold to a third party I may remark in conclusion that the right of pre-emption is a right which is exercised in derogation of the ordinary law, under which any person is empowered to dispose of his property as he pleases, and unless such right is clearly established beyond doubt, the only safe decision to make is that, in the absence of a clear proof that such right exists no decree can be passed in favour of the would be pre-emptor

1910

SHEORAJ KUNWAR v. HARIHAR BAKHSH SINGH

*De Gruyther K C.* and *S A. Kyffin* for the first respondent contended that the majority of the appellate court had rightly held that the appellant had no right of pre-emption of the villages in suit under either the 1st or 2nd clauses of section 9 of Act XVIII of 1876, on which provisions the decision of the case must rest The largest area over which the right could be exercised was a village: see section 7 of that Act, and section 40 of the Land Revenue Act (XVII of 1876). As to what a "mahal" is, reference was made to what took place after the annexation of Oudh as shown by the letter of 4th February, 1856, Oudh *Blue* Books, paragraphs 14 and 26; Sykes' compendium of *Taluqdari* Law, page 14; Thomason's Directions to Revenue Officers, page 1, paragraphs 3 and 5; page 22, paragraph 2; the definition of 'mahal" page 35, paragraph 47, and page 50; page 235, paragraph 161; and pages 236, 238 and 445; Act XVII of 1876, sections 68, 101 and 132 The appellant had no right now to reopen the question as to his preferential right to pre-emption of the pattis because he had acquiesced in the drawing of lots

*Ross* replied [*Lord Macnaghten* referred to the N.-W. P. Land Revenue Act (XIX of 1873), the definition of "mahal"].

1910, *May 7th*:—The judgement of their Lordships was delivered by LORD MACNAGHTEN:—

This appeal is concerned with a claim to pre-emption under the Oudh Laws Act, 1876, in respect of three entire villages and two pattis or portions of two other villages forming part of a taluqa called Saraura.

By section 9 of the Act the right of pre-emption where it exists is given on the occasion of a sale.

1st, to co sharers of the subdivision (if any) of the tenure in which the property is comprised in order of their relationship to the vendor * *,

2ndly, to co sharers of the whole mahal in the same order,

3rdly, to any member of the village community, and

4thly if the property be an under proprietary tenure to the proprietor"

and the section adds this provision:—

"where two or more persons are equally entitled to such right the person to exercise the same shall be determined by lot"

There were three brothers, sons of one Basti Singh, whose names were Baldeo Bakhsh, Balwant Singh, and Uman Prasad. Baldeo Bakhsh died leaving one son, Bisheshar Bakhsh. Balwant died leaving two sons, Sitla Bakhsh, who died childless,

1910

SHEORAJ KUNWAR v. HARIHAR BAKHSH SINGH.

to which the pattis respectively appertained, were equally entitled to the right of pre-emption. The order was that the appeal be allowed and the suit dismissed with costs in both courts as regards the three entire villages; and the parties were ordered to draw lots as regards the two pattis. This order was dated the 10th of August, 1906. A further order was made on the sam day declaring that lots having been drawn the right to buy the two pattis was found to lie with the appellant Harihar. The appeal was therefore allowed as regards the pattis, and the suit was dismissed as regards them also, and the parties were ordered to pay their own costs as regards the pattis in the court of appeal and below.

Their Lordships are of opinion that the judgement of the court of the Judicial Commissioner was right. The opinion delivered by Mr. Chamier, with which Mr. Evans was in substantial agreement, deals with the case very fully. It was contended, he said, that Ganesh Bakhsh was entitled to pre-empt under the first, or, failing that, the second clause of the section. The learned Judge pointed out that even if (as was suggested) each of the villages assigned to Uman Prasad were a subdivision of the tenure in which the property is comprised, it could not be said that Ganesh and Gajadhar were the co-sharers in any subdivision The question whether Ganesh could claim to pre-empt under the second clause was one he thought of greater difficulty. The word 'mahal,' he observes, is not defined in the Act, but he goes on to say:—

"The word is a term of the Revenue Law and as the Oudh Laws Act, 1876, and the Oudh Land Revenue Act were passed on the same day and refer to each other it is permissible to refer to the latter Act * * * in order to ascertain the meaning of the word 'mahal' in the Oudh Laws Act."

Then he refers to the case of *Munnu Lal* v. *Muhammad Ismail*, (1), and proceeds as follows:—

"Chapter V of the Revenue Act of 1876 shows that the word 'mahal' means any parcel or parcels of land which have been separately assessed to or are held under a separate engagement for the revenue and for which a separate record of rights has been prepared, and this is the sense in which the word has been used by Revenue and Judicial Officers since the first Regular Settlement of the Province. See Thomason's Directions to Revenue Officers, which was the guide book of officers engaged in that settlement * * * Each mauza or village is as a general rule a separate mahal, but a mahal may consist of two or

(1) (1904) I. L. R., 26 All., 574; L. R., 31 I. A., 212.

## List of Books and Publications for sale which are less than two years old.

## LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No 8, Hastings Street, Calcutta ]

THE PRICES OF THE GENERAL ACTS LOCAL CODES, MERCHANT SHIPPING, DIGEST INDEX TO ENACTMENTS AND THE DIGESTS OF INDIAN LAW CASES, 1901 TO 1907 (SEPARATELY AND PER SET OF FIVE VOLUMES) HAVE BEEN CONSIDERABLY REDUCED

THE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPARTMENT.

### I —THE INDIAN STATUTE BOOK

REVISED EDITION

*Super royal 8vo, cloth lettered*

### B —GENERAL ACTS

| | | |
|---|---|---|
| General Acts of the Governor General of India in Council, Vol I, from 1834 to 1867, Edition 1909 | Rs 6 | (10 a) |
| General Acts of the Governor General in Council Vol II, from 1868 to 1878, Edition 1909 | Rs 7 | (10 a) |
| General Acts of the Governor General in Council, Vol III, from 1879 to 1886, Edition 1909 | Rs 6 | (9 a) |
| General Acts of the Governor General in Council, Vol IV, from 1887 to 1897, Edition 1909 | Rs 6 | (9 a) |
| General Acts of the Governor General in Council, Vol V, from 1898 to 1903, Edition 1909 | Rs 6 | (9 a) |
| General Acts of the Governor General in Council, Vol VI, from 1904 to 1908, Edition 1909 | Rs 7. | (12 a) |

### C —LOCAL CODES

The Bengal Code, Third Edition, 1905, containing the Regulations and Local Acts in *force in Bengal Vols I to V.* Rs 6 a volume or Rs. 20 Reduced to Rs 20 for set of 5 Vols.

1910

ANANT SINGH v. DURGA SINGH.

by a custom in the family a step brother was entitled to succeed equally with the full brother, supporting his case wholly by wajib ul arzes made 30 years before suit the entries in which were admittedly made by the settlement officials after inquiries from the members of the family then living and were duly attested and signed The Court of the Judicial Commissioners found that though there was no rebutting evidence no instance was adduced in which the alleged custom had ever governed the devolution of the property and that besides the entries as to the custom the wajib-ul arzes contained other entries in which contradictory views of the parties who attested them were expressed and which afforded internal evidence against the existence of the alleged custom and held that the entries in the wajib-ul arzes were not although unrebutted sufficient proof of a custom in derogation of the ordinary Mitakshara law

*Held* (affirming the decision of the Judicial Commissioner) that no class of evidence was *more likely to vary in value than that of wajib ul arzes*—*Mahammad Imam Ali Khan* v *Husain Khan* (1) and *Parbati Kunwar* v *Chandarpal Kunwar* (2) and where as here it seemed probable that the entries recorded connoted the views of individuals as to the practice they would wish to see prevailing rather than the ascertained fact of a well-established custom the Judicial Commissioners rightly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed

APPEAL from a decree (29th May 1907) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (22nd October 1906) of the Subordinate Judge of Tahsil Biswan in District Sitapur and dismissed the appellant's suit

The suit was brought to recover a moiety of the property left by the appellant's half brother Ratan Singh, which consisted of a fourth share of an estate called Deokalia The defendant (respondent in this appeal) was the full brother of Ratan Singh and his heir under the ordinary Mitakshara law prevailing in Oudh, but the plaintiff in his plaint set up a family custom that a step brother was entitled to succeed equally with the full brother, and the only question for decision in this appeal was whether the custom had been established on the evidence

The parties belonged to a family of Ahban Thakurs and previously to 1874 the estate of Deokalia was held in severalty by four members of the family, namely, Ranjit Singh (the father of Anant Singh, the appellant, and Durga Singh the respondent), his brother Balwant Singh, their first cousin Mannu Singh and one Mahipat Singh, who represented another branch of the family

(1) (1898) I L. R 26 Calc 81 (92), L R, 25 I A 161 (169)

(2) (1909) I L. R 31 All. 457 (475) L R., 36 I A, 125 (131)

Act V of 1869 (Indian Articles of War) as modified up to 1st January 1909 ... ... ... ... ... Rs 1 2 0 (3 a)

Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908 ... ... ... ... ... 1 a (1 a)

Act VII of 1870 (Court Fees) as modified up to 1st February 1909 ... Rs 1 ? 0 (1 a)

Act XXIII of 1871 (Pensions) as modified up to 1st September 1909 ... ... ... 2 a 3 p (1 a)

Act XXVII of 1871 (Criminal Tribes) as modified up to 1st October, 1908 ... ... 5 a 6 p (1 a 6 p)

Act I of 1872 (Evidence) as modified up to 1st May 1908 ... Re 1 (2 a)

Act IX of 1872 (Contract) as modified up to 1st February 1908 Re 1 4 a (2 a)

Act IX of 1874 (European Vagrancy) as modified up to 1st September 1909 ... ... ... ... 6 a 6 p (1 a)

Act I of 1878 (Opium) as modified up to 1st October 1907 ... 5 a 6 p (1 a)

Act VI of 1878 (Treasure Trove) as modified by Act XII of 1891 as reprinted on the 14th February 1908 ... 2 a 9 p (1 a)

Act VIII of 1878 (Sea Customs) as modified up to 1st June 1908 Rs. 1-5-3 (4 a)

Act XI of 1878 (Arms) as modified up to 1st March 1910 6 a (1 a)

Act XVI of 1879 (Transport of Salt), as modified up to 1st October 1907 ... 1 a 6 p (1 a)

Act XIII of 1880 (Vaccination) as modified up to 1st September 1909 ... ... ... 4 a 9 p (1 a)

Act XV of 1881 (Factories) as modified up to 1st April 1910 ... 5 a 6 p (1 a 6 p)

Act XVIII of 1881 (Central Provinces Land revenue) as modified up to 1st March 1909 ... Rs 1 2 0 (3 a)

Act XXVI of 1881 (Negotiable Instruments) as modified up to 1st September 1909 ... 10 a (1 a)

Act II of 1882 (Indian Trusts) as modified up to 1st June 1909 10 a (1 a)

Act XII of 1882 (Salt) as modified up to 1st August 1909 7 a (2 a)

Act V of 1883 (Indian Merchant Shipping) as modified up to 1st September 1908 6 a (1 a)

Act IV of 1884 (Explosives) as modified up to 1st September 1908 4 a (9 p) (1 a)

Act IX of 1884 (Legal Practitioners) as modified up to 30th June 1909 1 a 6 p (1 a)

Act III of 1888 (Police) as modified up to 1st January 1909 ... 1 a 9 p (1 a)

Act II of 1889 (Measures of Length) with footnotes 1 a 3 p (1 a)

Act IV of 1889 (Indian Merchandise Marks) as modified up to 1st August 1908 ... 6 a (1 a)

Act VI of 1889 (Probate and Administration) as modified up to 1st January 1909 2 a 9 p (1 a)

Act VI of 1890 (Charitable Endowments) as modified up to 1st August 1908 ... 2 a 6 p (1 a)

Act IX of 1890 (Indian Railways) as modified up to 1st June 1909 Re 1 2 0 (? a)

Act XI of 1890 (Prevention of Cruelty to Animals) with foot notes ... 2 a (1 a)

Act XIII of 1890 (Excise Malt Liquors) as modified up to 1st October 1908 1 a 6 p (1 a)

Act X of 1891 (Indian Penal Code Amendment) as modified up to 1st August 1909 1 a (1 a)

Act XII of 1895 (Indian Companies Memorandum of Association) as modified up to 1st August 1909 2 a (1 a)

Act III of 1898 (Lepers) as modified up to 1st September 1909 4 a (1 a)

Act V of 1898 (Code of Criminal Procedure) as modified up to 1st August 1909 Rs 3 10 a (8

Act VIII of 1899 (Petroleum) as modified up to 1st January 1909 7 a (1 a)

1910

ANANT SINGH v. DURGA SINGH

custom in question does not exist can have no bearing upon the family custom set up by the plaintiff. The defendant has failed to rebut the evidence led by the plaintiff. We have in the case wajib-ul arzes recorded by the members of the family and containing a provision evidencing the existence of the custom in question. The plaintiff has examined some witnesses, out of whom at least two are near relatives of the parties. They were summoned by the defendant also. Their testimony is also in favour of the existence of the custom in question. The defendant relied upon the plaintiff's statement in the mutation case (Exhibit A 1). There the plaintiff stated that never it happened that a man died and was succeeded by his real and step brothers. It simply means that it never happened to the knowledge of the plaintiff. This statement of the plaintiff cannot destroy the value of the entries in the wajib ul arzes. The defendant's learned vakil, however, contends that the entries in the wajib-ul arzes can have no weight unless instances in support of the custom are proved."

After mentioning four authorities cited to support that contention the Subordinate Judge proceeded :—

"It was held in the first case that a wajib ul arz is not necessarily to be accepted as sufficient proof of a custom. In the second case wajib-ul arzes were not accepted as sufficient evidence of custom because they contained varying records as to the custom that was in dispute in that case. In the third case, it was held that a Court is not bound to accept a single wajib-ul arz as sufficient evidence of a particular custom. The fourth and the last case was decided by Their Lordships of the Privy Council, who have declined to accept a particular wajib ul arz as sufficient evidence of custom on grounds, amongst others, that it is so worded that it does not purport to be a record of immemorial custom. I do not think that it can be said on the strength of the above authorities that the wajib ul arzes relied upon in this case should not be accepted as sufficient evidence of the custom in question. On the contrary, in *Lekhraj Kuar* v. *Mahpal Singh* (1) Their Lordships of the Privy Council have observed that if certain wajib ul arzes were admissible in evidence they would prove a certain custom. The Oudh High Court has held a custom proved on the strength of wajib ul arzes and opinions only."

The Subordinate Judge therefore made a decree in favour of the plaintiff.

An appeal by the defendant to the Court of the Judicial Commissioner was heard by MR. SAUNDERS (officiating First Additional Judicial Commissioner) and MR. R. GREEVEN (Second Additional Judicial Commissioner), who reversed the Subordinate Judge's decision.

MR. SAUNDERS said :—

"The custom is set forth in clause 4 of the wajib ul arzes of three of the villages where portions of the property claimed lie and in the wajib ul arzes of 16 of the remaining villages, where other portions of the property

(1) (1879) I. L. R., 5 Calc., 744 (750); L. R. 7 I. A., 63 (67).

| | | |
|---|---|---|
| Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908 ... ... ... ... ... ... | In Urdu | 6 p (1 a) |
| Ditto ditto ... | In Nagri | 9 p (1 a) |
| Act XII of 1896 (Excise) as modified up to 1st March, 1907 . | In Urdu | 2 a [illegible] p (2 a.) |
| Ditto ditto .. | In Nagri | 3 a 3 p (2 a) |
| Act XIII of 1879 (Glanders and Farcy), as modified up to 1st February, 1908 .. . .. .. .. | In Urdu | 9 p (1 a) |
| Ditto ditto ... | In Nagri | 9 p (1 a) |
| Act I of 1906 [Indian Tariff (Amendment)] . | In Urdu | 3 p (1 a) |
| Ditto ditto . | In Nagri | 3 p (1 a) |
| Act III of 1906 (Coinage) .. | In Urdu | 9 p (1 a.) |
| Ditto ditto | In Nagri | 9 p (1 a) |
| Act V of 1906 (Stamp Amendment) . | In Urdu | 3 p (1 a) |
| Ditto ditto . | In Nagri | 3 p (1 a) |
| Act III of 1907 (Provincial Insolvency) . .. | In Urdu | 1 a 6 p (1 a) |
| Ditto . .. | In Nagri | 1 a 6 p (1 a) |
| Act IV of 1907 [Repealing and Amending (Rates and Cesses)] | In Urdu | 3 p (1 a) |
| Ditto ditto .. | In Nagri | 3 p (1 a) |
| Act V of 1907 (Local Authorities Loan) . | In Urdu | 3 p (1 a) |
| Ditto ditto . | In Nagri | 3 p (1 a) |
| Act VI of 1907 (Prevention of Seditious Meetings) ... ... | In Urdu | 3 p (1 a) |
| Ditto ditto .. . | In Nagri | 3 p (1 a) |
| Act I of 1908 (Legal Practitioners) ... . | In Urdu | 3 p (1 a.) |
| Ditto ditto . ... ... | In Nagri | 3 p (1 a) |
| Act II of 1908 (Tariff) ... ... ... . | In Urdu | 3 p (1 a.) |
| Ditto .. ... ... .. | In Nagri | 3 p (1 a.) |
| Act III of 1908 [Indian Trusts Amendment] ... ... ... | In Urdu | 3 p (1 a) |
| Act V of 1908 (Code of Civil Procedure) ... ... . | In Urdu | Rs 1 2 (6 a |
| Ditto ditto ... ... ... | In Nagri | Rs 1 2 (6 |
| Act VI of 1908 (Explosives Substances) ... ... . | In Urdu | 3 p (1 a.) |
| Ditto ditto .. ... ... | In Nagri | 3 p (1 a) |
| Act VII of 1908 (Incitements to Offences) ... ... . | In Urdu | 3 p (1 a) |
| Ditto ditto ... ... .. | In Nagri | 3 p (1 a) |
| Act IX of 1908 (Limitation) ... ... ... | In Urdu | 2 a (1 a.) |
| Ditto ditto ... ... ... ... | In Nagri | 2 a. (1 a.) |
| Act X of 1908 (Salt Duties) .. ... ... ... | In Urdu | 3 p (1 a) |
| Ditto .. ... ... ... | In Nagri | 3 p (1 a) |
| Act XI of 1908 (Assam Labour and Emigration) ... .. | In Urdu | 3 p (1 a) |
| Ditto ditto .. . | In Nagri | 3 p (2 a) |
| Act XIV of 1908 [Indian Criminal Law (Amendment)] .. ... | In Urdu | 3 p (1 a.) |
| Ditto ditto ... ... | In Nagri | 3 p (1 a) |
| Act XVI of 1908 (Indian Registration) ... ... | In Urdu | 2 a (2 a) |
| Ditto ditto ... ... | In Nagri | 2 a (2 a) |
| Act XVII of 1908. (Indian Emigration) ... ... | In Urdu | 2 a 3 p (1 a) |
| Ditto ditto ... ... | In Nagri | 2 a 3 p (1 a) |
| [Act I of 1909 (Indian Steamship Law Amendment)] ... ... | In Urdu | 3 p (1 a.) |
| Ditto ditto ... ... | In Nagri | 3 p. (1 a) |
| Act IV of 1909 (Whipping) ... ... | In Urdu | 3 p. (1 a) |
| Ditto ... ... | In Nagri. | |
| Act V of 1909 [Amending (Army Act)] ... ... | In Urdu. | |
| Ditto ditto ... ... | In Nagri. | |
| Act VII of 1909 (Anand Marriage) .. ... | In | |
| Ditto ditto ... ... | | |

1910

ANANT SINGH v. DURGA SINGH.

brings a suit based on a clause of the entries and asks the Court to presume that that clause embodies an ancient invariable custom always recognized and acted on by the family for which the wajib ul arzes were prepared, the question naturally arises whether that presumption is the only one possible, or whether the documents afford internal evidence against the existence of the custom

"No ruling, however, has been referred to wherein a particular custom of inheritance recorded in several wajib ul arzes has been held not to have been proved by those wajib ul arzes (with the correctness of the preparation of which no fault otherwise has been found) merely because in the same wajib ul arzes contradictory views of the parties who attested them in regard to other customs of inheritance have been entered.

"There are, however, many rulings in which the necessity of evidence in support of an entry in a wajib-ul arz of a custom in derogation of Hindu law is represented, even though no rebutting evidence has been produced I agree with the principle laid down in them In the judgement in *Ratan Singh* v *Chandika Bakhsh*, No 85 of 1896, Mr Chamier held that although a large number of the clan came forward and declared themselves bound by the alleged custom, and though the defendant had given all the evidence which in the nature of things was possible, while no rebutting evidence had been given by the plaintiff, it was for the former to establish the custom, and if the evidence in support of it is in itself insufficient failure on the plaintiff's part to rebut that evidence will not render it sufficient This decision was upheld by Their Lordships of the Privy Council in *Chandika Bakhsh* v *Muna Kunwar* (1)"

After giving other rulings the judgement concluded:—

"The result of these rulings is that mere entries of a custom in derogation of Hindu Law in a wajib ul arz or in several wajib ul arzes unsupported by other evidence, even though not rebutted by evidence on the other side, are not sufficient proof of the existence of the custom, and I think that it would be unsafe to hold otherwise"

"My conclusion therefore is that the so called custom is not proved and that it is a mere tradition of the family which has never been acted on."

MR. GREEVEN said —

"The novel feature in this case is that a number of wajib-ul arzes were adduced to prove the custom, which is recorded in them with complete consistency The gravamen of this appeal is that other entries, which are not connected with this custom, disclose that the wajib ul arzes as a whole, are entitled to no credit, because they embody in those entries, not family customs at all, but the inconsistent and discrepant wishes of individual members of the family It is conceded that, for this proposition, no direct precedent can be quoted, but I have no hesitation in holding that, if the defendant can show the wajib-ul arzes to contain, in other passages, difficulties sufficient to render them as a whole, unreliable, they should not be accepted, without strong confirmation, as proof of the custom in respect of which they disclose no inconsistency Even without authority on the subject (*Tragi* v. *Baiju*) (2) it is obvious to my mind

(1) (1902) I L R, 24 All, 273; L R, 29 I A, 70 (2) (1901) 4 Oudh Cases 71

## NOTICE TO SUBSCRIBERS.

In order that an opportunity may be afforded of investigating the cause of the non-delivery of any Part or Parts of the "Indian Law Reports, Allahabad Series," to subscribers, it has been found necessary to give notice that no complaint can be attended to regarding the loss of any Part or Parts unless information be forwarded to the Superintendent, Government Press, Allahabad, within three months after the date of publication: after that date back numbers can be supplied only on full prepayment and not at the reduced rate of *Re 0 5-0* per copy.

1910

ANANT SINGH v DURGA SINGH

the entries in any waj b ul arz, and when the witness was pressed with regard to the information received from his father he eventually had to admit ignorance '

And the judgement concluded —

' For these reasons I am of opinion first that no reliance can be placed upon the wajib ul arzes because they are not records of an ancient and certain custom, but embody irresponsible and conflicting wishes of members of the family and secondly that the oral evidence whether taken by itself or in connection with the wajib ul arzes is entirely insufficient to establish the professed custom.

In the result the appeal was allowed and the suit dismissed with costs

On this appeal—

*B. Dube* for the appellant contended that the custom alleged was proved by the evidence adduced in support of it. The wajib ul arzes were accurate and official records of the custom actually prevailing in the family of the parties They were prepared by Government officials after a careful inquiry at the revenue settlement more than 40 years ago, and all the then existing members of the family were unanimous in getting the custom recorded in the village administration papers This was stated in the judgement of the First Judicial Commissioner, but he held that the mere entries of a custom in the wajib ul arzes were not sufficient to prove the custom The second Judicial Commissioner held that the documents were not records of an ancient and certain custom, but "embody irresponsible and conflicting wishes of the members of the family" It was submitted that that finding was conjectural and opposed to the evidence on the record Moreover, the oral evidence went to prove the existence of the custom, and the respondent himself relied on the evidence of two of the appellant's witnesses and cited them as his own witnesses The evidence on the record was under the circumstances of the case sufficient to establish the alleged custom Reference was made to *Lekraj Kuar* v *Mahpal Singh* (1), the Oudh Settlement Circular No 20 of 1863, Parliamentary Papers relating to Oudh 1869, *Maheshar Baksh Singh* v *Ratan Singh* (2), *Chandika Bakhsh* v *Muna Kunwar* (3), *Bajrangi Singh* v *Manokarnika Bakhsh Singh* (4), *Muhammad Imam*

(1) (1879) I L R 5 Calc 744 (750) L R 7 I A 63 (67)

(2) (189 ) I L R 23 Calc 766 L R 23 I A 57

(3) (1901) I L R 24 All 273 (280) L R 29 I A 70 (72)

(4) (1907) I L R 30 All 1 L R 35 I A 1

1910

ANANT SINGH v DURGA SINGH

of Ranjit Singh There has been no omission therein There was some conflict regarding certain customs amongst Munna Singh, Mahipat Singh, Ranjit Singh, and Balwant Singh They got *separate* entries made regarding them" These entries were clearly in accordance with the proprietors' own wishes and interest, and for their own purposes Reference was made to the Parliamentary Papers relating to Oudh 1869, the Oudh Land Revenue Act (XVII of 1876), section 17, *Parbati Kunwar* v *Chandarpal Kunwar* (1), *Nandi Singh* v *Sita Ram* (2) *Lekraj Kuar* v *Mahpal Singh* (3), where the question was mainly as to the admission of wajib ul arzes in evidence *Uman Parshad* v *Gandharp Singh* (4), where it was held that the settlement officer should not enter in the wajib ul arz a mere expression of the views of the proprietor The conclusion come to by the Judicial Commissioner's court was entirely justified by the evidence, and particularly the expression of opinion by the Second Judicial Commissioner that the entries in the wajib-ul arzes produced in this case were not records of a custom but consisted of the conflicting wishes of members of the family

*B Dube* replied

1910, *May 7th* —The judgement of their Lordships was delivered by LORD COLLINS

The question on this appeal is as to the right of a step brother in a Hindu family to share equally with a brother of the whole blood in the succession of a deceased brother Ratan Singh died in 1899, leaving certain shares in the Deolala estate, as well as some house property He was succeeded by his widow, who died in April, 1903 On her death the appellant Anant Singh, his step brother, claimed to be equally entitled with Durga Singh, his sole surviving brother of the whole blood, to share in his succession His contention was upheld by the Subordinate Judge, but on appeal the learned Judicial Commissioners overruled his decision and held that the succession passed to the brother of the whole blood, the now respondent, alone The learned Judicial Commissioners, in their Lordships' opinion, gave excellent reasons for refusing to regard the evidence adduced by

(1) (1909) I L R 31 All 457 (470) L R 36 I A 125 (135 136)

(2) 1889) I L R 16 Calc 677 L R 16 I A 44

(3) (1879) I L R 5 Calc 744 (750 751 755) L R 7 I A 63 (65 72)

(4) (1887) I L R 15 Calc 20 (28 29) L R 14 I A 127 (131)

# TABLE OF CASES CITED

1910

KARANPAL SINGH v. BHIMA MAL.

THE facts of this case were as follows:—

The plaintiff sued the defendants for arrears of profits in the court of an Assistant Collector of the first class and filed his documentary evidence. The defendants prayed that the case might be adjourned pending the decision of another case, and the case was thus adjourned till 23rd October, 1907. On that date the other case had not been decided, but as the plaintiff was not present, the Assistant Collector dismissed the suit for default. The plaintiff appealed to the District Judge, who, on the authority of *Zohra* v. *Mangu Lal* (1), dismissed the appeal on the ground that no appeal lay.

The plaintiff appealed to the High Court and the case came on for hearing before KARAMAT HUSAIN, J., who by the following order referred the case to a Division Bench, on the 8th of June, 1909:—

"The suit out of which this appeal arises was a suit for profits The Assistant Collector on the 23rd October, 1907, dismissed the suit for default His order is as follows —'The plaintiff and his pleader are absent. Defendant and his mukhtar are present. Case is dismissed in default.' The plaintiff went up in appeal to the Judge and the learned Additional District Judge held, on the authority of *Zohra* v. *Mangu Lal* (1), that no appeal lay from an order, as distinguished from a decree of an Assistant Collector of the first class The plaintiff has preferred a second appeal to this Court, and one of the points taken in the memorandum of appeal is that an order dismissing the suit for default, under section 102, Civil Procedure Code, is a decree and not an order

"In support of this proposition the learned vakil for the appellant relies on *Ablakh* v *Bhagirathi* (2) and the cases cited therein, and also on *Gosto Behary* v. *Hari Mohan* (3), which follows I. L R, 9 All, 427.

"These cases distinctly lay down that an order dismissing a *suit* for default under section 102, is a decree The learned vakil for the respondent in answer to this contention relies on *Mansab Ali* v *Nihal Chand* (4) The point directly under consideration in that appeal was whether an order dismissing an *appeal for default under section 556, Civil Procedure Code, was an order or* a decree, but the reasoning given by the learned judges who decided the case would show that an order dismissing a suit or appeal for default is an order and not a decree No reference, however, is made in the judgment to the case reported in I L. R, 9 All, 427, nor can it be said that the case did directly decide that an order dismissing a *suit* is an order and not a decree

"*That case, however, can be cited as an indirect authority for* the proposition that an order dismissing a suit for default is an order only and not a decree There is, therefore, in a way a conflict of authority in this Court on this point and it is desirable to have a decision on the question by a Bench of two judges.

"I, therefore refer the appeal to a Bench of two judges."

(1) (1903) I L R 26 All., 753.
(2) (1887) I L R, 9 All., 427.
(3) (1903) 8 C. W. N., 318.
(4) (1893) I. L R., 15 All. 359.

# INDEX.

PAGE

1910

KARANPAL SINGH v BHIMA MAI

THE facts of this case were as follows.—

The plaintiff sued the defendants for arrears of profits in the court of an Assistant Collector of the first class and filed his documentary evidence The defendants prayed that the case might be adjourned pending the decision of another case, and the case was thus adjourned till 23rd October, 1907 On that date the other case had not been decided, but as the plaintiff was not present, the Assistant Collector dismissed the suit for default The plaintiff appealed to the District Judge, who, on the authority of *Zohra* v. *Mangu Lal* (1), dismissed the appeal on the ground that no appeal lay

The plaintiff appealed to the High Court and the case came on for hearing before KARAMAT HUSAIN, J., who by the following order referred the case to a Division Bench, on the 8th of June, 1909 —

"The suit out of which this appeal arises was a suit for profits The Assistant Collector on the 23rd October, 1907, dismissed the suit for default His order is as follows —'The plaintiff and his pleader are absent. Defendant and his mukhtar are present Case is dismissed in default' The plaintiff went up in appeal to the Judge and the learned Additional District Judge held, on the authority of *Zohra* v *Mangu Lal* (1), that no appeal lay from an order as distinguished from a decree, of an Assistant Collector of the first class The plaintiff has preferred a second appeal to this Court, and one of the points taken in the memorandum of appeal is that an order dismissing the suit for default under section 102, Civil Procedure Code, is a decree and not an order

'In support of this proposition the learned vakil for the appellant relies on *Ablakh* v *Bhagirathi* (2) and the cases cited therein, and also on *Gosto Behary* v *Hari Mohan* (3) which follows I L R, 9 All, 427

'These cases distinctly lay down that an order dismissing a suit for default under section 102 is a decree The learned vakil for the respondent in answer to this contention relies on *Mansab Ali* v *Nihal Chand* (4) The point directly under consideration in that appeal was whether an order dismissing an appeal for default under section 556 Civil Procedure Code, was an order or a decree but the reasoning given by the learned judges who decided the case would show that an order dismissing a suit or appeal for default is an order and not a decree No reference, however, is made in the judgment to the case reported in I L R., 9 All 427 nor can it be said that the case did directly decide that an order dismissing a suit is an order and not a decree

That case however can be cited as an indirect authority for the proposition that an order dismissing a suit for default is an order only and not a decree. There is, therefore in a way a conflict of authority in this Court on this point and it is desirable to have a decision on the question by a Bench of two judges

'I therefore refer the appeal to a Bench of two judges"

(1) (1903) I L R 23 All 753
(2) (1887) I L R, 9 All, 427.
(3) (1903) 8 C W N 313.
(4) (1893) I. L R, 15 All 359.

1910

KAPANPAL SINGH v. BHIMA MAL.

under section 536, of the Code of Civil Procedure" was not a decree When an appeal is dismissed for default, the appellate court does not make any judicial pronouncement whatever It does not confirm or modify or vary the decree appealed against It leaves the decree of the court below untouched He relied on *Virasamy Mudali* v *Manommany Ammal* (1)

The Full Bench case decided that any orders specially declared by the Code to have the force of decrees, would not have the force of decrees when passed under the Rent Act. Similarly any orders which would have the effect of decrees but for the "exception clause" in the new Code, would not cease to be decrees when passed under the Rent Act where the "exception clause" did not apply He further submitted that as the plaintiff had produced evidence, the suit should not have been dismissed for default, but should have been tried on the merits

He relied on *Badam* v *Nathu Singh* (2)

Munshi *Govind Prasad*, for the respondent, was not called upon

KNOX and KARAMAT HUSAIN, JJ.—The plaintiff, who is the appellant in this case, filed a suit in the Rent Court for profits On the date fixed for hearing neither the plaintiff nor his mukhtar were present in court, and the case was struck off the file in default The appellant then went in appeal to the Additional District Judge of Aligarh, and that court held that no appeal lay "The appellant" it observed, "was attempting to appeal from an order under the Tenancy Act of 1901, and that Act gave no right of appeal from an order" The appellant comes here in second appeal and contends that an appeal did lie We have heard a long and careful argument addressed to us by the learned vakil for the appellant, but the matter seems to us to be covered by the previous decisions of this Court Indeed there seems to us no need for any further decision on the point The Tenancy Act of 1901 is an Act which contains in itself an interpretation clause in which some twenty and more expressions used in the Act are interpreted No place is given in that section to the word 'order' Had it been the intention of the Legislature

(1) (18 9) 4 Mad, H C R p 32 (2) (1902) I L R 25 All, 194

1910

GANESH SINGH v. DEBI SINGH

property was, however, not given to the mortgagee, and consequently he brought a suit for possession. The parties came to terms and filed a compromise in accordance with which a money decree was passed in favour of Ganesh Singh. Subsequently, on default of payment in terms of the compromise decree Ganesh Singh applied for the execution of the decree by the attachment and sale of the same property which had formed the subject-matter of the mortgage.

The judgement-debtor objected that under the provisions of section 99 of the Transfer of Property Act [the same as order XXXIV, rule 14, of Act V of 1908] the property was not liable to sale. Both the courts below allowed the objection, holding that the property could not be sold.

The decree holder appealed.

Babu *Purushottam Das Tandan*, (with him The Hon'ble Pandit *Madan Mohan Malaviya* and Pandit *Rama Kant Malaviya*) for the appellant, submitted that the principle of section 99 of the Transfer of Property Act or of order XXXIV, rule 14 of the new Civil Procedure Code was that where a mortgagee had a *subsisting* mortgage he should not be allowed to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. The object of section 99 of the Transfer of Property Act was to prevent the mortgagee from depriving the mortgagor of his equity of redemption while his own remedies under the mortgage were open to him as against the mortgagor. Neither the section nor the rule had reference to a case where the mortgagee had no remedies open to him under the mortgage and where the mortgage had expired, having merged into a compromise decree. In the present case the decree holder had obtained a compromise decree in a suit brought upon the basis of the mortgage. He could not now bring a second suit on the basis of that mortgage. He was no longer a mortgagee, and by taking out execution of his decree he was not depriving the mortgagor of any rights under any mortgage. The judgment debtor had consented to the decree being passed against him and he was estopped from objecting to the execution of it.

Babu *Jogendra Nath Mukerji*, for the respondent, submitted that the word 'mortgagee' in section 99 of Transfer of Property

PAGE

1910

GANESH SINGH v. DEBI SINGH

In support of his contention the learned vakil laid stress upon the fact that the decree under which proceedings had been taken was a compromise decree, and therefore order XXXIV, rule 14, did not apply

The learned vakil for the respondents supported the orders of the courts below upon the authority of *Madho Prasad Singh* v *Baij Nath* (1) *Hem Ban* v *Bihari Gir* (2) and *Narsingh Das* v *Musammat Munna* (3) All these cases, however, are distinguishable from the present case In none of them had the judgment debtors in any way consented to the decree passed against them The facts of the present case bring it within the principle laid down by the Calcutta Court in *Rai Kashi Pershad Singh* v. *Babu Duleep Narain Sahu* (4) Both in the case here and in the case there the decree was passed on a compromise, and we agree with the Calcutta Court in holding that the respondents are consequently estopped from objecting to it The case here is even stronger than the Calcutta case, and, as the Calcutta Court observe, whether it be a good decree or a bad decree the court executing the decree cannot call it in question but must execute it

For these reasons we decree the appeal, set aside the orders of both the courts below, and return the case to the first court through the lower appellate court, with directions to readmit the proceedings upon its pending file and to dispose of them on their merits The appellant will get his costs in all courts

*Appeal decreed*

## REVISIONAL CIVIL

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain*

MATHURA PRASAD PANDE (APPLICANT) v GAURI SHANKAR DAS (JUDGEMENT DEBTOR) AND KALI CHARAN CHANDAR (DECREE HOLDER) *

*Civil Procedure Code (1882) section 308—Civil Procedure Code (1908) order XXI, rule 89—Execution of decree—Sale in execution—Forfeiture of auction purchaser s deposit*

An auction purchaser deposited in court Rs 1 000 out of a total sum of Rs 2 200 Owing to the judgement debtor making an application to have the sale set aside the auction purchaser did not deposit the remainder of the purchase

* Civil Revision No 51 of 1909

(1) Weekly Note 1905 p 153
(2) (1905) I L R, 28 All 58
(3) (1909) 6 A L J 731
(4) (1901) 8 C W N ...

language of sections 74, 75 and 76 is much wider than the language of the corresponding section in the Rent Act, XII of 1881, and that plants such as 'jasmine and bela' are included in the expression 'other products'

The court below has not come to any finding as to the value of the plants themselves. It is therefore necessary to remit an issue under the provisions of order XLI, rule 25, Civil Procedure Code, for a finding as to the value of the plants.

PRINCIPAL A... here note that the defendants did in the written 216 ...he right of the plaintiff to recover compen-
RELIGIOUS ENDO... ts.
RE MARRIAGE, S...
RES JUDICATA, Se...dence need be taken. Ten days will be 526 ...us on the return of the findings
Se...

*Issues remitted.*

STATUTES Consti... 48

SUCCESSION See ... Justice Richards and Mr. Justice Tudball.

SUIT to recover m... o ANOTHER (PLAINTIFFS) v. MADHSUDAN LALA Act No XV of ... AND OTHERS (DEFENDANTS)*

TAXATION Power schedule II a... on—Religious endowment—Ballavacharya Gosains

WAQF See Civil P... re is a dedication of property by a private individual ...he absence of any proof of disposal or direction by the ...will vest in the latter's heirs.

...ards temples belonging to the Ballavacharya Gosain ...succession of the Hindu law does not apply, but the ...special customs

...ustom set up by the plaintiffs by which a daughter's ...ccession was held not to have been established ...*Romanlalji Gossami* (1), *Rajah Muttu Ramalinga* ...*m Pillai* (2) and *Srimati Janoki Debi* v. *Sri Gopal*

...it to recover possession jointly with the ...nple belonging to the Ballavacharya Gosain ...ovable and immovable property appurtenant ...s of the case are fully stated in the judgement of

...o *Nath Chaudhri*, for the appellants.

*...No 288 of 1907 from a decree of Siraj ud din, Judge of the ...uses of Agra, exercising the powers of a Subordinate Judge ...August, 1907.

(1) ...I L. R., 17 Calc, 3 (2) (1874) L R, 1 I. A, 209
(1882) L R, 10 I. A, 32, I. L R, 9 Calc, 766.

1910

MATHURA PRASAD PANDE v. GAURI SHANKAR DAS

"shall be forfeited" The present Code, however, made it a discretionary matter, the words being altered to "may, if the court thinks fit be forfeited." Under the circumstances of the case the discretion ought to have been exercised in the applicant's favour

The opposite party was not represented

KNOX and KARAMAT HUSAIN, JJ. —These proceedings arise out of an application made by a purchaser of immovable property at a sale held by order of the court The applicant sets out that upon his being declared the purchaser he at once paid into court the sum of Rs 1,000 towards the purchase money, although he was required only to deposit at the time 25 per cent of the purchase money, i. e., of Rs 2,200 Before the balance of the purchase money was due from him the judgement debtor approached the court with an application under order XXI, rule 89 of the Code of Civil Procedure, 1908, and asked the court to set aside the sale under order XXI, rule 89 So far as we can ascertain from the record, along with this application the judgement debtor deposited in court a sum equal to five per cent of the purchase-money for payment to the purchaser He also deposited in court a sum for payment to the decree holder We are not concerned with that in these proceedings It does not, however, appear that the judgement debtor paid, as he ought to have done, any of the expenses of the sale By rules of the court this sum should have been paid in by court fees affixed to his application No such court fees are to be found Then, the present applicant approached the court with a petition asking that the money he had deposited, viz., Rs 1,000, might be refunded to him The reason for his not depositing the balance is stated by him to be a notice received by him from the judgement debtor to the effect that he was going to have the sale set aside, and therefore no need arose for depositing the balance The court refused to refund the money and the applicant comes to us contending that as regards Rs 450 out of the sum deposited by him, the court below had no jurisdiction to declare it forfeited to Government and that it could declare as forfeited only 25 per cent of the purchase-money which the purchaser is by law required to deposit immediately upon his being declared the purchaser. This contention appears to us to be sound

Bithal Nath Bithal Nath had seven sons, and they founded seven temples or *gaddis* which are still in existence These seven principal *gaddis*, which are called "the Tikait temples," have acquired considerable property representing offerings and dedications of the followers of the sect The Maharajas (as the Ballavacharya Gosains are styled) are supposed by their followers to be personages of great sanctity, and it is even sometimes said that they are incarnations of the deity himself They do not inter marry on account of the objection that they are all of the same *Gotra* Their wives are daughters of Bhats and their daughters are married to the sons of Bhats The history of the temple in dispute is not very ancient In the plaint it was alleged that the said Goswami Muttuji Maharaj was the owner of the property in suit This was denied by the defendants, who alleged it to be temple property or *debutter* The lower court found on the issue in favour of the defendants, and that finding is accepted by Mr *Chaudhri* on behalf of the appellants in this court; but he maintains that the appellants are entitled jointly with Madhsudan Lala to the possession of the property in the capacity of *shebaits* or superintendents and managers There is a dispute between the parties as to whether the temple was built by Muttuji or his father, but the evidence goes to show that it was the son who built it and first exercised the functions of a Gossin therein The immovable property is comparatively speaking of small value, being confined to a small grove and the temple in dispute No villages or landed property had been dedicated for its support But it is probable that in this temple, like many others of its kind, the offerings of the votaries are very considerable As to its history, the witness Chaturbhuj, a witness for the respondents, says that Dauji Maharaj (otherwise Damodarji, see pedigree at page 68R ), presented Muttuji with the idol of Madan Mohanji and that he presented the idol on the terms that "if a son or sons should be born to Muttuji's father they would regularly perform the *sewa puja* ceremonies, but if there should be none, it would be returned to him " The witness Ballu says that the building of the temple had begun before the mutiny, that Muttuji built it and that the land belonged to Girdhar Lalji and the temple was built with the latter's

1910

DIPAN RAI
v
RAM KHELAWAN

enjoy the yield of the field in lieu of the interest on his money We the executants shall pay the Government revenue every year from our own pocket The creditor shall have nothing to do with the Government revenue In case the creditor aforesaid has to pay the revenue, then after first paying him off this money for the revenue with interest thereon at one per centum per month, we shall be competent to pay the principal amount secured by this deed on any Jeth *puranmashi* and get the deed returned to us The creditor may have mutation of names effected in his favour in the revenue papers If any damage occurs to the field or if we or our heirs dispossess the creditor from the field then in that case we empower the creditor aforesaid to sue in Civil Courts and recover from our persons and movable and immovable properties the whole of his money together with damages at the rate of two rupees per cent per month from the date of dispossession and with all costs "

Physical possession, however, of the *sir* was not given to the mortgagee The mortgagee brought this suit for possession and in the alternative for recovery of the money secured by the mortgage The court of first instance dismissed the plaintiff's suit so far as recovery of possession was concerned, but gave him a decree for money under section 68 of the Transfer of Property Act, 1882 On appeal the District Judge confirmed the decree of the court of first instance The defendants appealed to the High Court

Mr *M L Agarwala*, for the appellants, contended that the appellants having become ex proprietary tenants, their continuance in cultivation did not amount to dispossession of the respondent The mortgage of the proprietary rights in the *sir* was a valid mortgage, and the possession of the mortgagee as such has not been disturbed He had the right to get rent assessed on the exproprietary tenancy of the mortgagor The covenant in the mortgage deed to deliver physical possession of the *sir* was invalid and the mortgagee could neither sue for delivery of possession nor for recovery of money He cited *Bhikham Singh* v *Har Prasad* (1) *Murlidhar* v *Pem Raj* (2)

(1) (1896) I L R. 19 All 35 (2) (1899) I L R. 2? All. 205

from there being a universal custom excluding daughter's sons, the very contrary prevailed in other temples All this argument proceeded on the basis that under the circumstances of the case the ordinary rule of Hindu Law as to inheritance prevailed, unless a custom contrary to that rule was proved, and that the onus of proving this custom rested on the defendant We are inclined to think if this foundation of the appellants' argument was sound, a great deal might be said for the proposition that the defendant has failed to prove a universal custom excluding daughter's sons

We propose now to consider the all important question whether this basis of the appellants' case is well founded It must be admitted that where there is a dedication of property by a private individual for religious purposes, in the absence of any proof of disposal or direction by the dedicator, the trusteeship will vest in the latter's heirs (*vide* I L R 17 Calc, p 3) It is contended, however, on the part of the defendant Gordhan Lalji that this rule does not apply to a case like the present, which raises the question of who shall be the *shebait*, not as between the heirs of a dedicator of property for religious purposes, but between claimants to the *shebaitship* against another person already in possession of the office and who is admittedly capable of performing the functions of the office Their Lordships of the Privy Council observed in the case of *Rajah Muttu Ramalinga Setupati* v *Perianayagum Pillai* (1) —"But the constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation and to be guided by them" This case was referred to in the case of *Srimati Janoki Debi* v *Sri Gopal Acharjia* (2), and at page 37 their Lordships re assert —"When, owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower of a religious institution, it must be proved by evidence what is the usage" The case out of which this

(1) (1874) L R 1 I A 209 (228) (2) (1882) L R, 10 I A 32; I L R, 9 Calc., 766.

1910

DIPAN RAI v. RAM KHELAWAN.

Mr M L Agarwala, in reply, submitted that section 65 of the Indian Contract Act had no application That section contemplated an agreement which was discovered to be void and not one which was void in its very inception There is a fiction that every person is supposed to know law. When Act II of 1901 was passed it was very widely discussed it must be presumed that the parties knew of its provisions If they entered into the transaction notwithstanding the express prohibitive clause in the Act, they must bear its consequences.

The case of Jijibhai Laldas v Nagji Gulab says that if two persons are equally guilty, the right of the person in possession must prevail Here the plaintiff is not in possession. Moreover, the ruling is opposed to I L R, 22 All, 205 The provision in the deed entitling the mortgagee to recover the money was dependent upon his suffering any loss in the field or being deprived of its possession through the default of the mortgagor He could not avail himself of such provision, as the covenant to give possession was in itself illegal

TUDBALL and PIGGOTT, JJ —The facts of the case out of which this appeal arises are as follows —

The defendants appellants were owners of certain lands which they cultivated as their sir On the 15th of July, 1905 they executed a document in favour of the plaintiff respondent to the following effect They set forth that they had taken a loan of Rs 599 from the plaintiff, and had placed him in actual physical possession of their sir lands, so that he might cultivate the lands himself or through sub tenants, in order that the plaintiff might recover from the income of the land the interest on his money They made a stipulation as to the payment of revenue due on the lands, with which we are not concerned They further contracted that they should redeem the mortgage only by paying the principal on the puranmashi of Jeth of any year They further stipulated that if they or any of their heirs in future should dispossess the plaintiff, then the latter should be able to recover from them the amount lent with interest as damages at the rate of 24 per cent per annum from their persons and property The document nowhere contains a hypothecation of the property in question It has been found

from there being a universal custom excluding daughter's sons, the very contrary prevailed in other temples All this argument proceeded on the basis that under the circumstances of the case the ordinary rule of Hindu Law as to inheritance prevailed, unless a custom contrary to that rule was proved, and that the onus of proving this custom rested on the defendant We are inclined to think if this foundation of the appellants' argument was sound, a great deal might be said for the proposition that the defendant has failed to prove a universal custom excluding daughter's sons

We propose now to consider the all important question whether this basis of the appellants' case is well founded It must be admitted that where there is a dedication of property by a private individual for religious purposes, in the absence of any proof of disposal or direction by the dedicator, the trusteeship will vest in the latter's heirs (*vide* I L R 17 Calc, p 3) It is contended, however, on the part of the defendant Gordhan Lalji that this rule does not apply to a case like the present, which raises the question of who shall be the *shebait*, not as between the heirs of a dedicator of property for religious purposes, but between claimants to the *shebaitship* against another person already in possession of the office and who is admittedly capable of performing the functions of the office Their Lordships of the Privy Council observed in the case of *Rajah Muttu Ramalinga Setupati* v *Perianayagum Pillai* (1) —" But the constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation and to be guided by them" This case was referred to in the case of *Srimati Janoki Debi* v *Sri Gopal Acharjia* (2), and at page 37 their Lordships re assert —"When, owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower of a religious institution, it must be proved by evidence what is the usage" The case out of which this

(1) (1874) L R 1 I A 209, (228)

(2) (1882) L. R., 10 I A 32; I L R, 9 Calc., 766.

1910

DIPAN RAI v. RAM KHELAWAN

part of the sale consideration on the failure of the vendor to put him in *such* possession. The present is a case not of sale but of mortgage, but under the Tenancy Act a mortgage of exproprietary right is as invalid as the sale mentioned in the above ruling. On behalf of the respondent no attempt has been made to support the decision of the lower court, but it has been urged that in view of the terms of section 65, Contract Act, now that the contract has been discovered to be void, the plaintiff is entitled to the return of his money. Attention on this point was called to the ruling *Jijibhai Laldas* v. *Nagji Gulab* (1). The position of the parties in the case quoted was the reverse of the position occupied by the parties to the present appeal. In that case a certain alienation was declared to be void on account of the terms of the Bhagdari Act, 1862. The transferee had actually been put in possession, and the alienor came into court suing for possession of the property on the ground that the transfer was void. The court decreed the claim only on the terms of the plaintiff refunding the money which he had received from the defendant, on the principle that he who seeks equity must do equity. The case is an example of the rule *in pari delicto potior est conditio defendentis.* In the present case the parties are in a totally different position. The defendants are in possession and the plaintiff seeks to enforce an agreement which is void. As was observed by BANERJI, J., in 22 All., 205, to accede to the plaintiff's request would be equivalent to enforcing an agreement the consideration of which was unlawful. That case was of a transfer of an occupancy holding. In our opinion the parties must be held to have known at the date of the execution of the mortgage-deed that the transfer of an exproprietary interest in the *sir* land was contrary to the provisions of the Tenancy Act and therefore void. The parties therefore are in *pari delicto*, and the case is clearly one of those in which relief cannot be given to the plaintiff. Section 65, Contract Act, does not apply to these circumstances. As the mortgage, in so far as it is a mortgage of proprietary rights, is a perfectly valid one, it is open to him to have rent assessed on the exproprietary tenure and to recover it from the

(1) (1909) 11 Bom., L. R., 693.

1910

SOHARAN v. BINDU

The plaintiffs appealed

On this appeal—

Babu *Durga Charan Banerji*, for the appellants, submitted that the mere fact that the respondents co sharers took the profits for the last twelve years before the suit could not make their possession adverse There must be an assertion of adverse possession and repudiation of other co sharers' title He cited *Mohan Lal* v *Badri Prasad* (1) and *Raj Bahadur* v *Bharat Singh* (2) Possession of a lambardar was not adverse, and similarly the possession of a co sharer could not be adverse

Pandit *Mohan Lal Sandal*, for the respondents, submitted that a lambardar stood in a fiduciary relation to other co-sharers The case of a co sharer in exclusive possession was different The withholding of one year's profits was notice enough that other title was being repudiated and that repudiation led to an adverse title to the plaintiffs' rights where the profits were with held for more than twelve years He cited *Tulsi Singh* v *Lachman Singh* (3)

STANLEY, C J, and BANERJI, J —The suit out of which this appeal has arisen was brought by the plaintiffs appellants for their share of profits of *shamlat*, that is, common land The court of first instance dismissed the suit on the finding that the plaintiffs had not received their share of profits within 12 years preceding the date of the suit The lower appellate court found that there was no evidence of any adverse claim or repudiation of the plaintiff's title by the defendants, and held that the mere non-payment of profits did not extinguish the plaintiffs' right It accordingly decreed the claim.

On appeal to this Court the learned Judge before whom the case came disagreed with the view of the lower appellate court and restored the decree of the court of first instance From this judgement the present appeal has been preferred under the Letters Patent

We are unable to agree with the view of the learned Judge of this Court He draws a distinction between the case of a lambardar and the case of co sharers making collections for the

(1) (1905) I L R. 27 All 436 (2) (1904) I L R., 27 All 343
(3) Weekly Notes 1881 p 0

which the daughter's sons are entitled to succeed to the management of the temple in dispute

We have already quoted at some length from the evidence of the only two Ballavacharya Gosains called by the plaintiffs and that very evidence in itself shows that there is no such custom or usage in force

The other witnesses are Bhats or other classes of Gosains They profess to give eleven instances in which daughter's sons have inherited temples from their maternal grandfathers The evidence is vague and leaves it in doubt whether these maternal grand fathers were Bhats or Ballavacharya Gosains

It is unnecessary to deal at length with this evidence It has been fully discussed in the judgement of the lower court We agree with that court that it falls far short of proving any such custom or usage as is put forward by the plaintiffs, especially in view of the instances in which arrangements have been made in certain temples by the widows and daughters of sonless Gosains to instal other Ballavacharya Gosains on the *gaddis* to the exclusion of their own grandsons and sons, who were Bhats

The burden of proof being on the plaintiffs, they have in our opinion failed to discharge it Their suit was therefore properly dismissed It is unnecessary to decide the other points raised in the case

We therefore dismiss the appeal with costs

*Appeal dismissed.*

---

*Before Mr Justice Richards and Mr Justice Tudball*

PARSOTAM RAO TANTIA AND ANOTHER (PLAINTIFFS) *v* RADHA BAI (DEFENDANT) * Fe

*Partition—Suit for partition of family property—Subsequent suit by one defendant against another for declaration of title—Res judicata*

Where a suit for partition to which all the members of the family are parties has once been finally decided, it is not competent to a party defendant to such suit to reopen the questions thereby determined in a fresh suit for a declaration of right as against a co-defendant. *Sheikh Khoorshed Hossein* v. *Nubbee Fatima* (1) *Dost Muhammad Khan* v *Said Begam* (2) *Assan* v *Pathumma* (3) and *Ashidbai* v *Abdulla Haji Mahomed* (4) referred to

---

* First Appeal No 25 of 1908 from a decree of Girdhari Lal Subordinate Judge of Cawnpore dated the 7th of January 1908

(1) (1878) I. L R 3 Calc 551
(2) (1897) I L R., 20 All 81
(3) (1897) I. L. R 22 Mad. 494.
(4) (1906) I. L. R., 31 Bom 271.

*Before Sir John Stanley Knight, Chief Justice, and Mr Justice Banerji*
BACHCHAN SINGH (PLAINTIFF) *v* KAMTA PRASAD AND OTHERS (DEFENDANTS) *

*Act No XV of 1877 (Indian Limitation Act), schedule II articles 91, 141—Limitation—Suit to recover possession of property sold by guardian during minority of plaintiff—Cancellation sale deed ancillary—Decree for possession conditional upon restoring such portion of the consideration as was for the minor s benefit*

*Held* that in the case of a suit to set aside an alienation of the plaintiff s property made during his minority by his guardian the limitation applicable is that prescribed by article 141 of the second schedule to the Indian Limitation Act, 1877 *Unni* v *Kunchi Amma* (1) followed *Abdul Rahman* v *Sukh Dayal Singh* (2) *Jhamman Kunwar* v *Tiloki* (3) and *Ram Dei Kunwar* v *Abu Jafar* (4) referred to

When, however such a sale is in part for the benefit of the minor plaintiff, he is in equity liable to make good to the purchasers the portion of the consideration by which he benefited and he would be entitled to recover the property only on condition of his paying to the purchasers that portion of the consideration *Gobind Singh* v *Baldeo Singh* (5) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgement of RICHARDS, J. The facts of the case sufficiently appear from the judgement under appeal, which was as follows —

This was a suit in which the plaintiff claimed a declaration that he was the owner of certain property and that his mother Musammat Bhawani had no power to make a transfer during his minority and that a sale-deed executed by his mother in favour of the defendant should be cancelled and that he be put in possession of the property The facts are fairly simple At the time of execution of the sale deed in question a decree had been passed by a court against the plaintiff himself in respect of a debt due by his father He was then a minor and his mother was his guardian in the suit and his natural guardian also. The courts below have held that a part of the sale at least was for the benefit of the minor The sale was a sale of half the property and by its means the other half was saved The consideration money was Rs. 400 and the lower court has held that out of Rs 400 Rs 285 was raised by the sale for the benefit of the minor Had the court found that the whole transaction was also for the benefit of the minor under the circumstances of the present case I do not think any one could find much fault with the decision However where a minor s property is concerned, the court is no doubt quite right to be very strict The minor came age in 1901 and the suit was not instituted until 14th August 1907 It seems me that the plaintiff should have instituted the suit at a much earlier date

* Appeal No 79 of 1909 under section 10 of the Letters Patent

(1) (1890) I L. R 14 Mad 26
(2) (1905) I L. R. 28 All. 30
(3) (1903) I. L. R. 25 All. 435
(4) (1905) I L. R 27 All. 494.
(5) (1903) I. L. R 25 All 330

no attempt was made to rebut that evidence. The court below had ignored that evidence altogether. Any change of possession brought about after the institution of the suit was not within the scope of section 42 of the Specific Relief Act. Further, the plaintiffs applied for amendment of the plaint, which was refused This was eminently a case in which the amendment should have been allowed. He cited *Kisandas Rupchand* v. *Rachappa Vithoba* (1).

The Hon'ble Pandit *Moti Lal Nehru* (with him the Hon'ble Pandit *Sundar Lal*), for the respondent, contended that on the evidence the plaintiffs were not in possession of the property; that the fact of their being *lambardars* of some villages did not prove that they were in possession on their own account, and that the application for amendment of the plaint was made only when the Subordinate Judge was on the eve of delivering judgement. That application was therefore properly rejected. The suit was barred by the rule of *res judicata* having regard to the decision of this Court in *Parsotam Rao* v. *Musammat Janki Bai* (2). He also relied on *Khoorshed Hossein* v. *Nubbee Fatima* (3), *Assan* v. *Pathumma* (4), *Ashidbai* v. *Abdulla Haji Mahomed* (5) and *Dost Muhammed* v. *Said Begam* (6).

Babu *Surendra Nath Sen*, in reply, submitted that the issue as to *res judicata* ought not to be determined in this Court, as all the facts of the case were not known. The Subordinate Judge took evidence only on the issue whether the suit was barred by section 42 of the Specific Relief Act. The former adjudication could not be pleaded as a bar, because the parties to the present suit were co-defendants in the former suit, and there was no hostility between the defendants *inter se* and between each of the defendants and the plaintiffs. None of the cases cited by the respondent laid down any general principle. They enunciated a special rule of law having reference to the particular facts of the case. The defendant, Madho Rao, was a *pro formâ* defendant and the conduct of the suit was not in his hands. He cited *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (7).

(1) (1909) I. L. R., 33 Bom., 644.
(2) (1907) I. L. R., 29 All., 354.
(3) (1878) I. L. R., 3 Calc., 551.
(4) (1897) I. L. R., 22 Mad., 494.
(5) (1906) I. L. R., 31 Bom., 271.
(6) (1897) I. L. R., 20 All., 81.
(7) (1886) I. L. R., 12 Calc., 580.

*Bose* v. *Ram Nidhi Pal* (1), *Janki Kunwar* v. *Ajit Singh* (2) *Gajeshri Prasad* v. *Dharam Dat* (3) and *Mallarjun* v. *Narhari* (4)

The suit was governed by article 144 or 91 of the Limitation Act and the plaintiff must get rid of the sale before he got possession of the property. He further submitted that it would not be just and equitable to deprive the respondents of the possession of the property sold to them for valid necessity after such a length of time. It would be more equitable to allow them to retain the property on payment of the portion of the consideration which had not been proved to have been paid for necessity. *Gobind Singh* v. *Baldeo Singh* (5) and *Ram Dei Kunwar* v. *Abu Jafar* (6) relate to a different state of things.

STANLEY, C. J., and BANERJI, J. —The suit out of which this appeal has arisen was brought by the plaintiff appellant to recover certain property sold by his mother Musammat Bhawani during his minority on the 7th of July, 1896. The plaintiff attained majority on the 1st of July, 1901, and instituted the suit on the 14th of August, 1907. His allegation was that his mother had no authority to sell the property and that there was no necessity for the sale. He asked for a declaration that the sale was void and could not affect his interests, and, as stated above, he sought to recover possession of the property comprised in the sale. The court of first instance decreed the claim in part. The lower appellate court held that the sale by the mother was for the benefit of the minor to the extent of Rs. 255, that is to say, that there was necessity for raising that sum for the benefit of the minor and to save his other property, and that to that extent the minor was liable. It made a decree for possession subject to the condition that the plaintiff should make good to the defendants Rs. 255. Otherwise the suit would stand dismissed. From this judgement two appeals were preferred and were disposed of by a learned Judge of this Court. He held that the claim was barred by limitation, not having been brought within three years from the date on which the plaintiff attained majority,

(1) (1902) C. C. W. N., 863
(2) (1887) I. L. R., 15 Calc. 58
(3) Weekly Notes, 1888 152.
(4) (1900) I. L. R. 25 Bom. 337
(5) (1903) I. L. R. 25 All., 330
(6) (1905) I. L. R. 27 All., 494

the Ram Chandra Rao to the particular property bequeathed to him by the will However, during the pendency of the suit, Ram Chandra Rao died and his widow took his place, and then it became the interests of the defendants Madho Rao and Parsotam Rao to urge that the family was joint By doing so, the rights of Mussammat Janki Bai, the widow of Babu Ram Chandra Rao, would be limited to a mere right of maintenance The suit was litigated from court to court, and finally there was a binding decree of the High Court holding that the family was separate This decree was passed in March, 1907 Madho Rao died in 1905, while the litigation was pending, but subsequent to the preliminary decree in the original court The learned Subordinate Judge has dismissed the present suit on the ground that the suit is barred by the provisions of section 42 of the Specific Relief Act It appears that after the decision of the High Court already referred to mutation of names was passed in favour of Musammat Radha Bai in respect of the share of Madho Rao, and the learned Judge held that it follows that Musammat Radha Bai must be deemed to be in possession, and that therefore the plaintiffs' suit fails because they have sued for a mere declaration without asking for possession At the same time the learned Judge refused to allow the plaintiffs to amend the plaint by adding a claim for possession on payment of the proper court fees We think it is impossible to support the decree of the court below on the ground on which it was passed If there was nothing else in the case we certainly would have allowed the plaint to be amended under the circumstances, so that all points might be threshed out between the parties We, however, think that there is another clear ground on which the plaintiffs' suit ought to be dismissed, namely, that having regard to the decision in the suit of *Babu Ram Chandra Rao* v *Parsotam Rao and Madho Rao*, it is no longer open to the plaintiffs Parsotam Rao and his son to bring the present suit The decree passed in the previous suit was a decree ascertaining and declaring the rights of the parties in a suit for partition Madho Rao, Parsotam Rao and Ram Chandra Rao were, as already mentioned, parties to that suit It is argued on behalf of the appellants that inasmuch as it does not appear that there was any dispute or conflict of interests between the plaintiffs

*Jhamman Kunwar* v. *Tiloki* (1) and also in *Ram Dei Kunwar* v. *Abu Jafar* (2). We are accordingly unable to agree with the learned Judge's view that article 91 applies to a case like this and that the suit should have been brought within three years of the date on which the plaintiff attained majority. The article applicable to such a suit is in our judgement article 141. It was contended by the learned vakil for the respondents that as the lower appellate court in its judgement held that the sale made by the plaintiff's guardian was for necessity, a decree for possession of the property ought not to have been made. It is true that in its finding on issue No. 5 the lower appellate Court said that Musammat Bhawani as *de facto* guardian was competent to execute the sale-deed of 7th July, 1896, in favour of the defendants and that it was executed for the plaintiff's benefit, but this finding must be read with the finding on the 4th issue, which is to the effect that a portion only of the consideration for the sale, namely Rs 285, was for the benefit of the plaintiff. The learned additional Judge accordingly made a decree for possession subject to the condition that the plaintiff should pay to the defendants the aforesaid sum of Rs 285 within a time fixed. We think that the lower appellate court was right in making a decree in the terms referred to above. The guardian of the plaintiff had no authority to sell his property except for his benefit, and if the plaintiff benefited only in respect of a part of the sale consideration, he is in equity liable to make good to the purchasers the portion of the consideration by which he benefited, and he would be entitled to recover the property only on condition of his paying to the purchasers that portion of the consideration. The learned vakil for the respondents asks us to affirm the decree of the first court which granted to the plaintiff a decree for a portion only of the property. We find no justification for the course adopted by that court. The principle hitherto applied by the courts in respect of such transactions is to make a decree for the property transferred by the guardian, but to attach to the decree the condition that the plaintiff should pay to the transferee so much of the consideration as was for his benefit or for which there was a justifying necessity. We may refer to *Gobind Singh*

(1) (1903) I. L R 25 All 435 (2) (1905) I. L. R, 27 All, 494.

291:—"When a suit for partition is brought by a person alleging that it is undivided property and that he has a share in it, the law requires that in order to enable the court to ascertain such person's share it must have before it as parties to the suit all the persons admittedly having or claiming to have shares in the property, otherwise there cannot be a valid, final and binding decree for partition. The quantum of the share of the plaintiff must be determined with reference to the number of sharers and their respective shares. And such a determination of the shares, being essential for the determination of the plaintiff's share, enables the court to pass a complete decree for partition allotting to each party, whether he is plaintiff or defendant, his share. In such a case it is obvious injustice that a defendant should be driven to another suit to have his share, already determined, partitioned off. That is the reason of the rule" We quite agree with the view taken in the several cases we have referred to, and we think that the plaintiffs cannot re-open any of the questions which were tried in the former suit. It is worthy of note that when the appeal in the former litigation was decided, the widow of Madho Rao, *i e.*, the present defendant, was arrayed as a respondent with the present plaintiffs as appellants.

At the conclusion of the judgement our attention was called to paragraphs 5 and 7 of the plaint. With regard to paragraph 5, where it is pleaded that re-union took place, we must say that this question of re-union has already been decided in the former suit. The learned Judges say:—"But in addition to this there had never been a joint title to the testator's property in the hands of his sons. Nana Narain Rao held it as self-acquired property, he made three separate devises to his sons, who took separately as *self-acquired property the interest so devised to them.* That being so, a question of reunion does not arise. That cannot be reunited which had never been joint." In paragraph 7 of the plaint it is alleged:—"Madho Rao executed a document on the 31st of January, 1905. In it he repeated the allegation of his family being joint and fixed only a maintenance allowance from Rs. 50 to Rs 75 for Musammat Radha Bai in case she refused to live with the plaintiffs. If for some reason or other, the family of the plaintiffs [and Madho Rao ]should be considered to be

goods, he remitted money to his employers at Mirzapur Finally he was called upon by his firm to furnish accounts He offered Rs 500 as a deposit but did not submit any account He did not in fact pay the sum which he offered as a deposit, and he failed to account for the goods entrusted to him The firm laid a complaint against him in Mirzapur, where he was tried and found guilty by a first class magistrate of an offence under section 408 of the Indian Penal Code He appealed unsuccessfully to the Sessions Judge, and then applied in revision to the High Court

Babu *Satya Chandra Mukerji*, for the applicant

The Government Advocate (Mr *W Wallach*) for the Crown, and Babu *Lalit Mohan Banerji*, for the other party

TUDBALL J —This is an application in revision against the conviction of the applicant of an offence under section 408 of the Indian Penal Code, by a magistrate of the first class of Mirzapur The conviction and sentence were upheld on appeal by the Sessions Judge Briefly stated the facts are as *follows* The applicant was employed as an agent by a firm in Mirzapur Goods were entrusted to him for sale in various districts in Lower Bengal, and from time to time, as he sold goods, he remitted money to his employers at Mirzapur Finally, at the end of the cold weather, he was called upon to furnish accounts He offered Rs 500 as a deposit, but did not submit any account It has been found that he failed to submit any account and that he failed to pay even the Rs 500 which he had first offered to deposit There can be no question or doubt that the applicant had to account for either the goods or the money, and that he failed to produce either

Objection is taken that the courts of Mirzapur had no jurisdiction to try the case against the accused, as the charge showed he had embezzled the money at various places in Lower Bengal In view of the decision in *Queen Empress* v *O'Brien* (1), it seems to me that the Mirzapur courts had jurisdiction to try the case It is impossible to state exactly where the act of embezzlement or the various acts of embezzlement took place, but they must have taken place either at Mirzapur, or at one of the various districts

(1) 189[illegible]) I L R 19 All 111

*Before Sir John Stanley Knight, Chief Justice and Mr Justice Banerji*

RUKIA BEGAM (PLAINTIFF) v MUHAMMAD KAZIM AND OTHERS (DEFENDANTS) *

*Muhammadan law—Marriage—Dower—Act No XVIII of 1876 (Oudh Laws Act)*

*Held* that the mere fact that a marriage was celebrated in Lucknow the parties being afterwards domiciled in the province of Agra was not sufficient to authorize a court in the province of Agra to apply to a suit brought by the wife against the heirs of her deceased husband for recovery of her dower the provisions of the Oudh Laws Act 1876 *Zakeri Begum* v *Sakina Begum* (1) followed.

THE facts of this case were as follows —The plaintiff, the widow of a Muhammadan gentleman, brought this suit against the heirs of her deceased husband for the recovery of her dower The deceased was a resident of Muzaffarnagar where he practised as a vakil The marriage had taken place at Lucknow The amount of dower fixed was Rs 1 25 000 The wife only sued the heirs for Rs 25 000 which represented the assets of the husband The property against which the decree was sought was situated at Meerut The court of first instance gave a decree for Rs 10,000 relying on the provisions of the Oudh Laws Act, XVIII of 1876, which render dower reducible in certain cases by the court

The plaintiff appealed

The Honb'le Pandit *Moti Lal Nehru*, for the appellant, contended that the discretion given to the courts of Oudh did not extend to courts in other parts of the country The courts of Oudh had been given some special powers which the courts of other provinces could not exercise The Additional Judge of Meerut had no jurisdiction to administer the provisions of the Oudh Laws Act and had no authority to reduce the dower fixed He relied on the Privy Council case of *Zakeri Begum* v *Sakina Begum* (1)

The respondent was not represented

STANLEY, C J, and BANERJI, J —The plaintiff in the suit out of which this appeal has arisen is the widow of the late

*First Appeal No 284 of 1908 from a decree of Kanhaiya Lal Additional Judge of Meerut dated the 30th of June 1908

(1) (1892) I L R 19 Calc 689

and not of a custom and that as the settlement of 1267 has come to an end the plaintiff could no longer claim pre emption under the provisions of that wajib ul arz Both the courts below have decreed the plaintiff's suit The defendant comes here in second appeal The same pleas are urged here as were raised in the courts below The wajib ul arz of 1267 bears the alternative heading "*dastur dehi*" After setting out the names of the co-sharers in the village it recites "*joke bandobast jadid hamare gaon ka* 484 *rupiya salyana matami sarkar se mukarrar hua hai, is waste iqrar ham malkan wa lambardaran ka yih hai ke ta miyad bandobast wa ayanda ta takmil bandobast sani paiband rahkar amal daramad karange*" In the later wajib ul arz, so far as we can ascertain from the copy on the record, there are some provisions relating to payment of rent, to partition and to other matters, and the document concludes — "*Baki digar dasturat dehi ke babat wajib ul arz san* 1267 *dekha jaega*" For the appellant reliance is placed on the wording of the preamble recited above and particularly the words "*ta miyad bandobast wa ayanda ta takmil bandobast sani paiband rahkar amal daramad karenge*" as showing that the parties intended that the wajib ul arz should be enforced only until the new settlement It is also contended that the words "*amal daramad karenge*" should be taken as governing all the succeeding clauses and not only the preceding clause relating to the assessment of revenue I am also referred to the rulings reported in Weekly Notes, 1907, p 285, Weekly Notes, 1908, p 246 and 6 A L J, 9 In the two former, which were from the same district namely, Saharanpur, as is this case, the wajib-ul arz recited that co-sharers will continue to be bound by 'the conditions following' The learned District Judge regards the omission of this phrase from the wajib ul arz in this case as material This omission certainly differentiates this case from the rulings reported in W N, 1907, and W N, 1908. The case reported in Vol. 6 of the Allahabad Law Journal at page 9 is not particularly in point I have to look to the terms of the wajib ul arz in this particular case" It appears to me that the agreement set out at the opening of the document refers more particularly to the Government revenue for the term in which the settlement was to remain in force The words '*is waste*' before the word '*iqrar*' indicates that the following words refer to the words immediately preceding, namely, to the assessment of revenue The signatures which are appended at the foot of the wajib-ul arz show that the signatories agreed to be bound by the conditions set out in the document, and it is not necessary to read the preamble as governing all the conditions which follow Apart from this preamble there is no indication as to the condition relating to pre-emption that the right of pre-emption was a right created by contract solely In my opinion the courts below were right in decreeing the plaintiff's suit I dismiss the appeal with costs"

The defendant appealed.

Dr. *Tej Bahadur Sapru*, for the appellant.

Munshi *Gulzari Lal*, for the respondent.

STANLEY, C. J. and BANERJI, J.—The only question in this appeal is whether or not the record of a right of pre emption

Judge was varied by the High Court only as regards the amount of the dower. An appeal was preferred and the judgement of their Lordships of the Privy Council was delivered by Lord Hannen, who in the course of his judgement sets out the defence raised by the defendants, namely, amongst others, that, as the marriage took place at Lucknow, the contract of dower was regulated by the usages and customs of Oudh, and that by those usages and customs the agreed amount of dower, if excessive, might be reduced by the *court to an amount suitable to the* circumstances and position of the husband and wife. This contention the court of first instance repelled, and, their Lordships say, rightly. At page 698 of the report in reference to this matter their Lordships say, that they "agree with the Subordinate Judge that the usages and customs of Oudh as to dower were not applicable to the marriage in question" Fortified by this decision of their Lordships of the Privy Council we are unable to uphold the decision of the court below. We may further point out that the Act XVIII of 1876 is stated in the preamble to be "an Act to declare and amend the laws to be administered in Oudh." This indicates that it is only the courts administering laws in Oudh which could put in force the provisions of the Act.

We therefore allow the appeal. We modify the decree of the court below, and allow the plaintiff, in lieu of the sum of Rs. 10,000 awarded to her, the full amount claimed by her, namely, Rs. 25,000. The plaintiff will have her costs in both courts.

*Appeal decreed.*

---

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin*

LALTA PRASAD AND ANOTHER (PLAINTIFFS), *v.* ZAHUR-UD-DIN AND ANOTHER (DEFENDANTS) *

*Contribution—Attachment—Purchase of part of attached property by a third party who satisfies the whole claim—No right of contribution against the remainder acquired by the purchaser.*

An attaching creditor does not obtain by his attachment any charge or lien upon the attached property. Where therefore a third party purchased a portion of certain property under attachment and satisfied the whole of the creditor's claim, it was *held* that the purchaser acquired no right of contribution as against the

* Second Appeal No 112 of 1909, from a decree of W. H Webb, District Judge of Bareilly, dated the 9th of November, 1908, modifying a decree of Girraj Kishore Dat, Subordinate Judge of Bareilly, dated the 12th December, 1906.

settlement it was provided that as to the remaining customs in the village the record of rights prepared in the former settlement is to be looked at. The language of these two wajib-ul-arzes is very similar to that of the wajib-ul-arzes which are relied upon in the case before us. It was held in that case that the earlier wajib-ul-arz recorded not a custom but a contract, which came to an end with the term of the settlement, and the later wajib-ul-arz could not be construed as the record of a custom which sprung up in the interval of 30 years between the two settlements, and there was therefore no right of pre-emption in the village. This was an appeal under the Letters Patent from the decision of one of us and that decision was upheld by a Bench of two Judges of this Court of which the other of us was a member. It was followed in the case of *Muhammad Sabir* v. *Sat Ram*, First Appeal No. 222 of 1905, decided on the 22nd of July 1907, the particulars of which are given in a note to the report of the case of *Maratib Husain* v. *Alam Ali*. In the second mentioned case of *Budh Singh* v. *Gopal Rai* the wajib-ul-arz of a village in the same district of Saharanpur, of the year 1867, contained an agreement on the part of the *khewatdars* of the village that up to the term of settlement and in future up to the termination of the next settlement they would abide by "the following terms and act upon them." Amongst the subsequent provisions were certain conditions relating to the right of pre-emption. In the later wajib-ul-arz of 1890 no mention was made of any custom of pre-emption, but there were the following words "for the remaining village customs see the wajib-ul-arz prepared in 1867." It was therein held that the wajib-ul-arz of 1867 recorded a contract and not a custom, and that the rights conferred by it would not be perpetuated by the reference made in the later wajib-ul-arz to the customs existing in the village.

We are unable to distinguish the provisions of the wajib-ul-arz in the present case when properly interpreted from the wajib-ul-arz in the cases which we have cited. The learned Judge of this Court from whose decision this appeal has been preferred differentiated the two cases by the fact that in the wajib-ul-arz before us the words "undermentioned conditions" or "conditions following" do not appear in the preamble. It appears to us,

transfer In 1885 Ram Mohan Lal's interest was perfected by means of an actual transfer from the reversioners, but this after acquired interest could not feed the estoppel in favour of Lalji Mal inasmuch as there was no interest created in the property There was only a contract for sale, and under section 54, Transfer of Property Act, such a contract creates no interest in the property In 1891, when the actual transfer was made by Ram Mohan Lal to Lalji Mal, the property had already been placed under attachment, and under section 276, Code of Civil Procedure, 1882, the transfer was void as against the attaching creditor The property thus remained all along Ram Mohan Lal's and the Judge below was wrong in supposing that the property had become Lalji Mal's The case of *Annu Mal* v *The Collector of Bareilly* (1), on which the court below had relied, had no bearing upon the present case, for there was no question of countervailing equities in this case The plaintiffs purchased their share of Ram Mohan Lal's property subject to attachment, just as the defendants had done The plaintiffs paid off the amount of the entire decree, and saved the attached properties, the shares of the defendants being also included, from impending sale Consequently for the benefit which they conferred upon the others in excess of their own *quota* of liability the plaintiffs were entitled to claim contribution from those on whom the benefit had been conferred

Maulvi *Shafi-uz zaman* (for Zahur ud din and Fakhr ud din, respondents), contended that Ram Mohan Lal had no interest in the property at the date when these respondents purchased it, and they were not bound to recoup the plaintiffs for any loss they might have incurred

Babu *Lalit Mohan Banerji*, for *Jugal Kishore* respondent —

No claim for contribution arises in this case A claim for contribution can be maintained only under two circumstances, viz, when in order to save his own property it is absolutely necessary to save the property of others and thus a benefit is conferred upon those others, and secondly, when the properties are subject to a common charge The properties were simply under attachment, and that creates no charge Again, all the

(1) (1906) I L R 28 All, 315

*Before Mr. Justice Sir George Knox and Mr Justice Karamat Husain*

GYANENDRA NATH BASU (DECREE-HOLDER) *v* RANI NIHALO BIBI AND OTHERS (OBJECTORS) *

*Civil Procedure Code (1882), section 234—Hindu law—Joint family—Decree obtained against uncle executed against nephews—Legal representatives—Limitation Act No XV of 1877 (Indian Limitation Act), schedule II, article 170—Application against persons not the legal representatives*

A simple money decree was passed against one Raja Suchit Prasad Singh. He died leaving a widow and two nephews. Application for execution was made against the two nephews, but was dismissed, upon the ground that the property sought to be taken in execution was ancestral. A second application for execution was made against other property, alleged to be self-acquired, and this time against the widow as well as the nephews.

*Held* that the nephews were not the legal representatives of the deceased judgement-debtor, and this being so, an application for execution against them could not be held to keep the decree alive as against the widow, with respect to whom it was otherwise barred by limitation. *Veerappa Chettiar* v. *Ramaswami Aiyar* (1) referred to. *Ramanuj Sewak Singh* v. *Hingu Lal* (2), *Gopal* v *Har Prasad* (3) and *Hari* v. *Narayan* (4) distinguished.

THE facts of this case were as follows:—

The appellant obtained, on 5th February, 1904, a simple money decree against Raja Suchit Prasad Singh Shortly after, the Raja died, leaving a widow and two nephews. The first application for execution of the decree was made on 19th April 1905, against the nephews alone in respect of certain immovable properties alleged to be the assets of the late Raja in their hands It was disallowed on the ground that these properties had come to them by right of survivorship and not by inheritance, inasmuch as they were ancestral properties, and the Raja, together with the nephews, had been members of a joint Hindu family. Some time after this, an arrangement was effected between the decree-holder and one of the nephews; the nephew wrote a letter on 22nd January, 1906, saying that he was arranging for Rs. 500 as part payment, although in this letter he denied his liability for the decretal amount; and Rs. 500 was paid on 16th February, 1906. This adjustment and the part payment were made out of court, and were not certified under section 258, Civil

* Second Appeal No. 591 of 1909 from a decree of E H. Ashworth, District Judge of Benares, dated the 2nd of April 1909 confirming a decree of Maula Bakhsh, Subordinate Judge of Benares, dated the 25th of January 1909.

(1) (1903) I. L. R., 27 Mad., 100.
(2) (1891) I. L. R., 3 All., 517.
(3) Weekly Notes, 1892, p. 211.
(4) (1897) I. L. R., 12 Bom., 427.

have arisen to obtain contribution from transferees from Ram Mohan Lal of his interest in the other villages

Mr *Lalit Mohan Banerji*, on behalf of the respondents in Second Appeal No 114 of 1909, raised a point which was not considered in the courts below His contention was that the attachment of the villages in question did not create any lien or charge upon them, and that consequently as between the plaintiffs appellants and the respondents there was no common burden which the plaintiffs appellants discharged so as to give them a right to call upon the defendants respondents for contribution

We think that this contention is well founded The right to contribution arises when two or more persons are liable to discharge a common burden The principle is that they should discharge it rateably in accordance with the equitable principle that '*equality is equity*' and *if one discharges the entire burden*, he has a right of contribution against the others, or, in other works, as the doctrine has been stated, "where a common liability rests on several persons in favour of a single claimant, equity will enforce such liability upon all the class in accordance with the maxim 'equality is equity'" In this case we fail to discover that there was any common burden In the case of *Moti Lal* v *Karrabuldin* (1) their Lordships of the Privy Council held that attachment only prevents alienation and does not confer a title (see page 185) This ruling of their Lordships was followed in the case of *Peacock* v *Madan Gopal* (2) It was there held by a Full Bench, overruling the earlier decision in *Miller* v *Lukhimani Debi* (3), that an attaching creditor does not obtain by his attachment any charge or lien upon the attached property The decree holder then in the case before us did not by the attachment acquire any lien or charge upon the property of his judgement-debtor That property when sold by the latter became vested in the transferees, subject only to the right which the decree holder had of executing his decree and selling the property for the realization of his debt No steps, however, were taken for the purpose of carrying out a sale in execution of the decree beyond the fact that the property was advertised for

(1) (1897) I L. R., 25 Calc 179 (2) (1902) I L. R 29 Calc, 428
(3) (1901) I. L. R., 28 Calc 419.

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain*

GYANENDRA NATH BASU (DECREE HOLDER) *v* RANI NIHALO BIBI AND OTHERS (OBJECTORS) *

*Civil Procedure Code (1882), section 234—Hindu law—Joint family—Decree obtained against uncle executed against nephews—Legal representative—Limitation Act No XV of 1877 (Indian Limitation Act), schedule II article 179—Application against persons not the legal representatives*

A simple money decree was passed against one Raja Suchit Prasad Singh. He died leaving a widow and two nephews. Application for execution was made against the two nephews, but was dismissed, upon the ground that the property sought to be taken in execution was ancestral. A second application for execution was made against other property, alleged to be self-acquired, and this time against the widow as well as the nephews

*Held* that the nephews were not the legal representatives of the deceased judgement-debtor, and this being so, an application for execution against them could not be held to keep the decree alive as against the widow, with respect to whom it was otherwise barred by limitation *Veerappa Chettiar* v *Ramasami Aiyar* (1) referred to *Ramanuj Sewak Singh* v *Hingu Lal* (2), *Gopal* v *Har Prasad* (3) and *Hari* v. *Narayan* (4) distinguished

THE facts of this case were as follows:—

The appellant obtained, on 5th February, 1904, a simple money decree against Raja Suchit Prasad Singh Shortly after, the Raja died, leaving a widow and two nephews The first application for execution of the decree was made on 19th April 1905, against the nephews alone in respect of certain immovable properties alleged to be the assets of the late Raja in their hands It was disallowed on the ground that these properties had come to them by right of survivorship and not by inheritance, inasmuch as they were ancestral properties, and the Raja, together with the nephews, had been members of a joint Hindu family. Some time after this, an arrangement was effected between the decree-holder and one of the nephews; the nephew wrote a letter on 22nd January, 1906, saying that he was arranging for Rs 500 as part payment, although in this letter he denied his liability for the decretal amount; and Rs. 500 was paid on 16th February, 1906. This adjustment and the part payment were made out of court, and were not certified under section 258, Civil

* Second Appeal No. 591 of 1909 from a decree of E. H. Ashworth District Judge of Benares, dated the 2nd of April 1909 confirming a decree of Maula Bakhsh, Subordinate Judge of Benares, dated the 25th of January 1909

(1) (1903) I. L. R., 27 Mad., 106.
(2) (1891) I. L. R., 8 All., 517.
(3) Weekly Notes, 1893 p. 211.
(4) (1897) I. L. R., 12 Bom., 427.

Code of Civil Procedure, 1882, to file the award; that the filing of the award was resisted on the ground of misconduct of the arbitrators; that the Court refused to file it on that ground, and that therefore the present suit was barred by the provisions of section 13 of the Code The court of first instance (Subordinate Judge of Mainpuri) gave effect to this contention of the defendants and dismissed the suit The plaintiff appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Braj Nath Vyas*, for the appellant

Babu *Jogindro Nath Chaudhri*, (with him Babu *Lalit Mohan Banerji* and Babu *Girdhari Lal Agarwala*) for the respondents

RICHARDS and TUDBALL, JJ —This appeal arises out of a suit which was brought to enforce an award The defence was that there had been an application under section 525 of the Code of Civil Procedure, Act No XIV of 1882, to file the award; that the filing of the award was resisted on the ground of misconduct of the arbitrators; that the court refused to file it on that ground, and that therefore the present suit was barred by the provisions of section 13 of Act No XIV of 1882 The court below decided in favour of this contention and hence the present appeal It is contended on behalf of the appellant that the refusal to file the award cannot possibly operate as *res judicata*, because the order of the court refusing to file the award on the ground of the misconduct of the arbitrators was not a decision made *in a suit* and that the only matter before the court on that application was the question whether or not the award should be filed On behalf of the respondents it is contended that the refusal to file the award, on the grounds mentioned, must be deemed to be a decision in a suit, and, the court having decided the very issue on the application, the question as to the validity of the award cannot be again raised and that the plaintiff's suit is accordingly barred Section 525 of the Code of Civil Procedure, Act No XIV of 1882, provides as follows —"When any matter has been referred without the intervention of a court of justice, and an award has been made thereon, any person interested in the award may apply to the court of the lowest grade having jurisdiction over the matter to

In the next place, a fresh period commenced to run from the date of the acknowledgment, and again from the date of the part payment, by the nephew, although the payment was made out of court and was not certified under section 258, Civil Procedure Code (1882); *Roshan Singh* v *Mata Din* (1) The nephews' position as regards the possession over the self acquired property of the deceased is analogous to that of a residuary legatee, and hence their acknowledgment can bind the widow

As to the case against the nephews —The former application was only in respect of certain specified properties. The scope of that proceeding was limited to the question whether we could proceed against those properties Those properties were ancestral; the property now proceeded against is self acquired—so there can be no *res judicata* We can proceed against any self acquired property of the deceased in the possession of the nephews They are not strangers, they are the reversionary heirs, and a reversioner has some present interest in the property, as is manifested by the fact that his consent has the effect of validating an alienation of the property by the widow which would otherwise be invalid and imperfect, in other words he has the power of supplementing the defect in the widow's title

The Hon'ble Pandit *Sundar Lal* (with him Dr *Satish Chandra Banerji*), for the respondents, was not called upon

KNOX and KARAMAT HUSAIN JJ —This appeal arises out of execution proceedings taken by one Gyanendra Nath Basu, decree holder, against Rani Nithalo Bibi, widow of the deceased Raja Suchit Prasad Singh, and his nephews, Raja Nityanand Prasad Singh and Kunwar Satyanand Prasad Singh In this particular appeal No 594, the widow is the principal respondent, but in E S A No 595, the nephews above mentioned, are the principal respondents In both the cases the other party or parties have been made *pro forma* respondents The two appeals have been argued as one appeal and our judgement will stand as the judgement in both appeals The decree was obtained by the appellant on the 5th of February 1901 At that time Raja Suchit Prasad Singh was alive and the decree was passed against him

(1) (1903) I L. R., 25 All., 35

that it may be useful to state generally the conclusions of which their Lordships have arrived on some of the disputed points brought to their attention in the course of the argument" Their Lordships then proceed to deal with the matter under several heads The third head was ' where the agreement of reference is made and the arbitration itself takes place without the intervention of the court and the assistance of the court is only sought in order to give effect to the award" At page 183 of the report Lord Macnaghten says —" In cases falling under Heads II and III the provisions relating to cases under Head I, are to be observed so far as applicable But there is this difference, which does not seem to have been always kept in view in the courts in India In cases falling under Head I, the agreement to refer and the application to the court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the court So that no question can arise as to the regularity of the proceedings up to that point In cases falling under Heads II and III proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of the court That is or may be a litigious proceedings—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression, as defined in the Civil Procedure Code" We are inclined to think that where their Lordships refer to the order made thereon, they must have referred not only to an order granting leave to file the award but also to an order refusing such leave We, however, feel that we are bound by the authority of certain rulings of this court In the Full Bench case of *Bhola* v *Gobind Dayal* (1) it was held by four Judges out of five that no appeal lay from an order disallowing an application to file an award under section 525 That decision proceeded on the grounds that the order was not a decree, and it seems to us that this involves a decision that the proceedings under the application did not constitute a suit This decision was followed in the case of *Katik Ram* v *Babu Lal* (2) The case of *Ghulam Khan* v *Muhammad Hassan*, to which we have

(1) (1884) I L R 6 All 185 (2) Weekly Notes 1903 page 234,

and is wrong in the view it took of the effect of the order passed on the application of the 19th April, 1905, operating as *res judicata* The learned vakil for the appellant contended very earnestly on behalf of his client that the order of the 8th of July, 1905, passed on the application of the 19th April, 1905, was an order limited to the particular property The property covered by the present application being quite separate and distinct, the court in the previous proceedings was not called upon to consider the position of the nephews save and except in relation to the property which was then aimed at in the execution proceedings and the order passed by the court on that occasion must be deemed to be an order determining the position of the nephews only in relation to the property covered by those proceedings For this position he was unable to put forward any authority For the reasons which will be given by us in this judgement we do not consider it necessary to go into the question thus raised Conceding for a moment that the nephews are in possession of the property alleged to be in their possession, and even conceding further that the property is, as it is alleged to be, the self-acquired property of the deceased, we hold that the nephews are not the legal representatives of the deceased, and for this we have the authority of the case of *Veerappa* v *Ramaswami A* Dr Sutch
the case cited the widow and the undivided b uled upon
deceased were jointly made the legal repre al arises out of
deceased, and the District Judge allowed exec nath Basu, de-
against both in respect of property not only deceased Raja
but also partnership property. The learned Nityanand Prasad
widow alone was the legal representativ In this particular
execution could not proceed against the respondent, but in
in possession of any portion of the assets tioned, are the prin
perty They directed the name of the r party or parties
and execution granted under section 234 he two appeals have
the legal representative of the deceased I will stand as the
if we were to concede the two points which obtained by the
we hold that the nephews are not the legal time Raja Sachit
deceased Raja Suchit Prasad Singh for the ed against him

(1) (1903) I L R, 27 Mad., 1

*Before Sir John Stanley, Knight, Chief Justice and Mr Justice Banerji*

MULA (DEFENDANT) v PARTAB (PLAINTIFF)*

*Act No XV of 1856 (Hindu Widows Re marriage Act), section 2—Hindu widow—Re marriage permitted by rules of caste—widow not deprived of property of first husband*

Where the rules of her caste recognise the right of a Hindu widow to re-marry, a second marriage has not the result of divesting her of the property of her first husband

THE facts of this case were as follows —

One Sirıa, a Taga Brahman, was the owner of certain property. He died leaving him surviving his widow, Mathuri, and his mother Tulsha. The names of these ladies were entered as owners after his death The ladies executed a deed of gift in 1885 in favour of Nanda, the brother of Mathuri Nanda died leaving Chhajju his heir Chhajju mortgaged a portion of the property and sold another portion to the defendants Musammat Tulsha died some years ago, and Musammat Mathuri contracted a *karao* marriage 7 years ago The reversioners brought this suit for possession of Sirıa's property on the ground that Musammat Mathuri had only a limited interest in the property which she lost after contracting the second marriage The court of first instance (second Additional Judge of Meerut) decreed the suit The defendant appealed

Pandit *Mohan Lal Sandal*, for the appellant, submitted that the suit did not lie during the lifetime of Mathuri She still had her interest in the property *Karao* was a recognised form of marriage among the Taga Brahmans The only consequence was that a *Bisa* Brahman widow became a *Dasa* Brahman after second marriage It derogated from her social position, *Khuddo* v *Durga Prasad* (1) and *Gajadhar* v *Kaunsilla* (2) If the marriage were invalid, Musammat Mathuri would be held to be living in concubinage with the man with whom she purported to contract a second marriage and subsequent unchastity did not affect her right of inheritance

Maulvi *Shafi-uz-zaman*, for the respondents, submitted that the ruling in *Khuddo* v *Durga Prasad* only applied to cases where second marriage was allowed *Karao* was not sanctioned

* First Appeal No 19 of 1909, from a decree of Kanhaiya Lal second Additional Judge of Meerut dated the 3rd of September 1908.

(1) (1906) I L R, 29 All., 122 (2) (1908) I. L. R, 31 All, 161.

ORA ASU ... HALO

and is wrong in the view it took of the effect of the order passed on the application of the 19th April, 1905, operating as r *judicata*. The learned vakil for the appellant contended very earnestly on behalf of his client that the order of the 8th of July, 1905, passed on the application of the 19th April, 1905, was an order limited to the particular property. The property covered by the present application being quite separate and distinct, the court in the previous proceedings was not called upon to consider the position of the nephews save and except in relation to the property which was then aimed at in the execution proceedings, and the order passed by the court on that occasion must be deem to be an order determining the position of the nephews only relation to the property covered by those proceedings. For position he was unable to put forward any authority. For reasons which will be given by us in this judgement we do consider it necessary to go into the question thus raised. Co ing for a moment that the nephews are in possession of property alleged to be in their possession, and even conc further that the property is, as it is alleged to be, the sel. property of the deceased, we hold that the nephews legal representatives of the deceased, and for this authority of the case of *Veerappa* v. *Ramaswami A* the case cited the widow and the undivided b deceased were jointly made the legal repre deceased, and the District Judge allowed exec against both in respect of property not only but also partnership property. The learned widow alone was the legal representativ execution could not proceed against the in possession of any portion of the assets perty. They directed the name of the and execution granted under section 234 the legal representative of the deceased. if we were to concede the two points wh we hold that the nephews are not the legal deceased Raja Sachit Prasad Singh for t

Di ... uled ... ath ... de ... N ... In th ... respond ... tioned, ... er ... t ... w

(1) (1903) I. L. R., 27

rulings of this court this contention seems to us to be correct. It has been held in a number of cases in this court that where according to the custom of the caste the re-marriage of a widow is valid, Act XV of 1856 is inapplicable. This has been the course of rulings in this court, and although personally we may have hesitation in accepting the view adopted in those rulings, we think we are bound by the uniform course of decisions in this court, and must therefore hold that section 2 of Act No. XV of 1856 is inapplicable to a case like this. This being so, the decree of the court below cannot be supported. The result is that we allow the appeal, set aside the decree of the court below and dismiss the plaintiff's suit with costs in both courts.

*Appeal allowed.*

## MISCELLANEOUS CIVIL.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

THE RAJPUTANA MALWA RAILWAY CO-OPERATIVE STORES, LIMITED, (APPLICANT) v. THE AJMERE MUNICIPAL BOARD (OPPOSITE PARTY)*.

*Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 2, 61, 62 and 120—Limitation—Suit to recover from a Municipal Board money alleged to have been illegally levied as octroi duty—Municipal Board's powers of taxation.*

A Municipal Board, in disregard of certain lawful orders of the Government of India, levied upon a Company trading within municipal limits certain sums by way of octroi duty over and above what they were legally entitled to levy. *Held*, on suit by the Company to recover from the Board the sums so levied, (1) that the suit would lie and (2) that the suit was one for money had and received to the use of the defendant within the meaning of article 62 of the second schedule to the Indian Limitation Act, 1877. *Morgan* v. *Palmer* (1) and *Neate* v. *Harding* (2) referred to *Seth Karimji* v. *Sardar Kirpal Singh* (3) dissented from.

THE facts of this case were as follows:—

The plaintiff company were general merchants and importers at Ajmere. They sued the Municipal Board of Ajmere for refund of Rs. 81-7-0, alleged to have been wrongly charged by the Board as octroi duty for goods imported by the Company into India by sea between the 20th of January, 1899, and the

*Civil Miscellaneous No. 246 of 1909.

(1) (1824) 2 B. and C, 729, 26 R. R., 537.  (2) (1851) 6 Exch., 349; 86 R. R., 328.

(3) Punj. Rec., 1886, C. J., 283.

said to be written by Nityanand Prasad Singh, on the 22nd January, 1906, amounted to payment and acknowledgment as are intended by sections 19 and 20 of the Indian Limitation Act, 1877. We hold that neither the alleged payment nor the alleged letter amounts to a payment or acknowledgment intended in those sections. We dismiss the appeal in both the cases with costs

*Appeal dismissed*

Municipality was competent under section 41 of Regulation V of 1886 to impo e octroi duty on goods brought within its limits Its framing its octroi schedule the Municipal Board purported to act n pursuance of the Regulation, which was "an enactment in force in British India" within the meaning of article 2 of the Limitation Act In honest ignorance of the Resolutions, and honestly believing that a state of facts existed which justified the Municipality in imposing duty on sea borne goods, the Municipality charged the duty complained of It was true that section 41 of the Regulation ought to have put the defendant upon inquiry as to whether any Resolutions of the Governor General in Council sanctioned the duty or not The defendant acted negligently, but not maliciously If the defendant, acting under powers conferred by Regulation V of 1886, erroneously exceeded the powers given, but acted honestly in order to exercise such powers he must be considered as acting in pursuance of the Regulation It was the tortious act of the defendant which gave rise to this suit Although the plaintiffs sought to have their money *refunded*, it was in substance a suit for compensation for the doing of an act by the defendant in excess of the powers given by Statute The tortious act having been committed with reference to specific sums, the compensation which the plaintiffs were entitled to was the refund of those sums Having reference to these facts, the suit was barred by article 2 of the Indian Limitation Act He referred to *Ganesh Das* v *C F Elliot* (1) *Narpat Rai* v *Sirdar Kirpal Singh* (2) and *Seth Karimji* v *Sardar Kirpal Singh* (3) which were cases in point, and also to *Ranchordas Moorarji* v *The Municipal Commissioner for the City of Bombay* (4) which supported him in principle

Mr *M L Agarwala* was not called upon to reply

STANLEY, C J, and BANERJI, J —This is a reference under section 18 of the Ajmere Courts Regulation No 1 of 1877 The plaintiff company carries on business as general merchants in Ajmere, and for the purposes of its trade imports oilman's stores and other articles for sale They sued the Municipal Board of

(1) Punj Rec 1883 C J 487
(2) Punj Rec 1886 C J 138
(3) Punj Rec 1886 C J 283
(4) (1901) I L R 25 Bom., 387

# DISTRICT

# GAZETTEERS,

## UNITED PROVINCES.

---

*The undermentioned Gazetteers of Districts in the United Provinces have recently been published by the Government Press, and are available for sale to the public at the Government Book Depot, Allahabad. The prices quoted include packing and postage charges :—*

| | Rs. | a. | p. |
|---|---|---|---|
| Bulandshahr .. | 3 | 6 | 0 |
| Bahraich .. | 2 | 14 | 0 |
| Sultanpur .. | 2 | 14 | 0 |
| Unao .. | 3 | 6 | 0 |
| Hardoi ... | 3 | 6 | 0 |
| Bara Banki . | 3 | 6 | 0 |
| Sitapur .. | 2 | 14 | 0 |
| Kheri ... | 2 | 14 | 0 |
| Meerut ... | 3 | 6 | 0 |
| Lucknow ... | 3 | 6 | 0 |
| Ballia .. | 3 | 6 | 0 |
| Muzaffarnagar . | 3 | 6 | 0 |
| Naini Tal . | 3 | 6 | 0 |
| Rae Bareli | 2 | 14 | 0 |
| Partabgarh ... | 2 | 14 | 0 |
| Fyzabad . | 3 | 6 | 0 |
| Gonda ... | 3 | 6 | 0 |
| Agra ... | 3 | 6 | 0 |
| Fatehpur ... | 3 | 6 | 0 |
| Basti ... | 3 | 6 | 0 |
| Budaun ... | 3 | 6 | 0 |
| Bijnor .. | 3 | 6 | 0 |
| Jaunpur ... | 4 | 6 | 0 |
| Benares ... | 4 | 6 | 0 |
| Ghazipur ... | 3 | 6 | 0 |
| Pilibhit ... | 2 | 14 | 0 |
| Banda ... | 3 | 6 | 0 |
| Saharanpur ... | 3 | 6 | 0 |
| Cawnpore ... | 4 | 6 | 0 |
| Hamirpur ... | 2 | 14 | 0 |
| Jalaun ... | 2 | 14 | 0 |

*Apply to the SUPERINTENDENT,*
*Government Press, Allahabad.*

By the Resolutions of the Government Nos 55 to 60, dated the 24th of April, 1899, a maximum rate of duty on articles subject to sea customs duty was prescribed, viz, Rs 1-9 0 per cent Under section 41, Regulation No V of 1886, the Municipal Committee of Ajmere Merwara was empowered, with the previous sanction of the Chief Commissioner, and "subject to any general rules, or special orders which the Governor General in Council may make in this behalf" to impose in the whole or any part of the Municipality, among other taxes, an octroi on goods brought within the Municipality for consumption or use therein

It will be observed that the power thus conferred is subject to any general rules or special orders, passed by the Governor *General in Council From the 6th of November, 1868, up to* the 24th of April, 1889 the Resolution of the Government of India of the 6th of November, 1868, was in force, and sea-borne goods were exempted from liability to any octroi duty From the date of the Resolution of the 24th of April, 1899, up to the 17th of December, 1903, when a further Resolution was passed raising the rate of duty, the maximum rate of octroi duty chargeable by the Municipality was Rs 1-9 0 per cent Whether the Municipal Committee was or was not aware of those Resolutions, it ought to have been aware of them, as the power conferred upon them to impose taxes was expressly subject to any general rules or special orders passed by the Governor General in Council The Committee ought to have made inquiry and ascertained if there were any such general rules or special orders in existence, and it is idle for the Committee under the circumstances to contend that the tax imposed by it was imposed in good faith It was in direct violation of the Regulation under which the Committee purported to act We are wholly unable to agree with the learned Assistant Commissioner and District Judge that the tax complained of was not illegally levied The fact that the Resolutions of 1868 and 1899 were not forwarded to the Municipality is beside the question It was the duty of the Municipal Committee to inquire and ascertain if there were any such resolutions in existence before they imposed taxes. We have no hesitation, therefore, in answering question

does not ask for compensation or damages In the plaint in clear and express terms it asks for a decree for the payment of two specific sums representing amounts illegally taken by the Municipality, one sum representing amounts received between the 20th of January, 1899, and the 24th of April, 1899, and the other representing sums taken after the 24th of April, 1899, being the difference between 6¼ per cent actually taken for duty and Re 1 9 0 per cent which the Municipality was by the Resolutions of Government permitted to realize This is in the nature of a claim for money had and received by the defendant Municipality for the plaintiff's use and is not a claim for compensation or damages It is the old count for money had and received in modern dress If the plaintiff Company had sought compensation under article 2 it would have been open to it to claim a much larger sum than the sum actually claimed For example it might have reasonably claimed interest on the amount of the sums improperly taken by the Municipality from time to time. The claim in our opinion therefore clearly comes within article 62 and not within article 2

The learned Judicial Assistant Commissioner observes that the suit is "virtually a suit in respect of an act done in pursuance of an enactment" It may be so But it is not a suit for damages or compensation In holding that the suit was one coming under article 2, he relied upon two cases decided by the Chief Court of the Punjab, in which it was held that a suit for the refund of money wrongfully levied under the colour of law, was a suit for compensation to which article 2 would apply. In the judgement in one of these cases—*Seth Karimji* v *Sardar Kirpal Singh* (1)—Plowden, J, in delivering judgement observed as follows —I think, therefore, that notwithstanding the suit may fall within the description given in article 62 or 96 of the second schedule, and be in other respects maintainable in either of these forms, yet for the purposes of limitation the defendant is entitled to rely upon the suit being in substance of the description given in article 2 and to insist upon the benefit of the provisions of article 2" We are wholly unable to agree with the learned Judge in the opinion thus expressed

(1) Panj Rec, 1886, C J, 283.

The Bombay Code, Vol. I, Third Edition, 1907 ... ... ... Rs. 4. (6 a.)
Ditto Vol. II, Third Edition, 1907 ... ... ... Rs. 6. (8 a.)
Ditto Vol. III, Third Edition, 1908 ... ... Rs. 5. (8 a.)
Ditto Vol. IV, Third Edition, 1909 ... ... ... Rs. 4. (8 a.)
Volumes I to IV. Reduced to Rs. 11 per set.
The Coorg Code, Third Edition, 1908 ... ... ... Rs. 2. (4 a.)
E. B. & Assam Code, Vol. I, Edition, 1907 ... ... ... Rs. 6. (10 a.)
Ditto Vol. II, Edition 1907 ... ... ... Rs. 6. (9 a.)
Ditto Vol. III, Edition, 1907 ... ... ... Rs. 6. (9 a.)
Volumes I to III reduced to Rs. 16 per set.
The United Provinces Code, Vol. I, Fourth Edition, 1906, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table ... ... ... Rs. 5. (6 a.)
The United Provinces Code, Vol. II, Fourth Edition, 1906, consisting of the Acts of the Lieutenant-Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in, or extended to, the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874, with an Index Rs. 10 (Re. 1) for both Vols. or Rs. 5 (8a.) for each Volume.
The United Provinces Code, Vols. I and II reduced to Rs. 7 per set.

*In the Press.*

A new edition of the Burma Code.

## II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION.

Act I of 1846 (Legal Practitioners), as modified up to 1st October, 1907 ... ... ... ... 2 a. (1 a.)
Act XXI of 1850 (Removal of Caste Disabilities) with foot-notes ... 1 a. 6 p. (1 a.)
Act XXXVII of 1850 (Public Servants Inquiries), as modified up to 1st August, 1908 ... ... ... ... 11 a. (1 a.)
Act XXX of 1852 (Naturalization of Aliens), as modified up to 30th April, 1908 ... ... ... ... 2 a. (1 a.)
Act XX of 1853 (Legal Practitioners), as modified up to 1st September, 1907 ... ... ... ... 1 a. 9 p. (1 a.)
Act XXIV of 1854 (Malabar War—Knives) with foot-notes ... 1 a. 3 p. (1 a.)
Act XXIII of 1855 (Administration of mortgaged Estates), as modified up to 1st October, 1908 ... ... ... 1 a. 3 p. (1 a.)
Act XXIV of 1856 (Penal Servitude), as modified up to 1st January, 1909 ... ... ... ... ... ... 2 a. (1 a.)
Act XIII of 1857 (Opium), as modified up to 1st August, 1908 ... 4 a. 3 p. (1 a.)
Act XXVII of 1857 (Madras University), with foot-notes ... ... 2 a. 9 p. (1 a.)
Act IX of 1859 (Forfeiture), as modified up to 1st October 1908 ... 1 a. 9 p. (1 a.)
Act XXIV of 1859 (Madras District Police), as modified up to 1st November, 1907 ... ... ... ... ... 3 a. 6 p. (2 a.)
Act XVI of 1863 (Excise Duty on Spirits), as modified up to 1st October, 1908 ... ... ... ... ... 2 a. (1 a.)
Act XXXI of 1863 (Gazette of India) with footnotes ... ... 1 a. 3 p. (1 a.)
Act XV of 1864 (Indian Tolls), as modified up to 30th June, 1909 ... 1 a. 9 p. (1 a.)
Act X of 1865 (Succession), as modified up to 1st April, 1909 ... Rs. 1-6 (3 a.)
Act XXII of 1867 (Sarais and Parsees), as modified up to 1st August, 1908 ... ... ... 2 a. (1 a.)
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907 ... ... ... ... ... 3 a. (1 a.)

# APPELLATE CIVIL.

*Before Mr Justice Sir George Knox and Mr Justice Karamat Husain*

KAUNSILLA (DECREE HOLDER) *v* ISHRI SINGH (JUDGEMENT DEBTOR) *

*Civil Procedure Code* (1908), *section* 48—*Execution of decree—Decree for sale upon mortgage passed before* 1908—*Retrospective effect of Statutes*

*Held* that, the right to enforce execution of a decree being a substantive right and not a mere matter of procedure, section 48 of the Code of Civil Procedure (1908) will not have the effect of barring the execution of decrees which were passed prior to the enactment of that Code and were, having regard to the Code of Civil Procedure of 1882 and to the Indian Limitation Act, 1877, alive at the time of its coming into force. *Smith* v. *Callander* (1), *Phillips* v *Eyre* (2) and *Boddam* v. *Morley* (3) referred to.

THE facts of this case were as follows :—

Musammat Kaunsilla, on the 24th of November, 1893, obtained a decree against one Ishri Singh This decree she first put into execution on the 24th of January, 1895. Several other applications were made by her for execution. All these were infructuous, but in each one of them apparently some step was taken in aid of execution, and the present application was instituted within three years of a previous application for execution to a proper court in accordance with law. On the 25th of February, 1909, she instituted the proceedings out of which the present appeal has arisen. The judgement-debtor at once took a plea, based upon section 48 of Act No. V of 1908, that, as more than twelve years had expired from the date of the decree, no order for execution could be made. Both the courts below accepted this plea and summarily rejected the application. They were of opinion that section 48 above mentioned did bar execution

The decree holder appealed.

Munshi *Govind Prasad* (with whom Babu *Jogendra Nath Mukerji*), for the appellant, contended that, having regard to section 6, clause (c), of the General Clauses Act (X of 1897), section 48 of Act V of 1908 did not have retrospective effect; that under the Civil Procedure Code of 1882 a decree other than

* Second Appeal No 755 of 1909 from a decree of Muhammad Ishaq Khan, District Judge of Farrukhabad, dated the 27th of April 1909, confirming a decree of Rama Das, Munsif of Kanauj, dated the 5th of March, 1909

(1) (1901) A. C, 297. (2) (1870) L R, 6 Q B, 1 (23)
(3) (1857) 1 DeG. and J, 1 (23)

Act XVI of 1899 (Northern India Canal and Drainage) with foot-notes, 1 *a* (1 *a*.)

Act X of 1904 (Co-operative Credit Societies) with reference to rules under the Act .. .. .. 8 *a* 6 *p* (1 *a*)

Regulation III of 1818 (Bengal State Prisoners Regulation), as modified up to 1st August, 1903 ... .. .. 2 *a* 9 *p* (1 *a*)

Regulation I of 1890 (British Baluchistan Laws Regulation), as modified up to 1st June, 1909 ... .. ... .. 3 *p* (1 *a*.)

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (Unrepealed) of the Governor General of India in Council from 1907 up to date

Regulations made under the Statute 33 Vict., Cap 3 from 1907 up to date

The above may be obtained separately The price is noted on each.]

## IV —TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Act XXI of 1850 (Caste Disabilities), with foot notes In Urdu. 3 *p* (1 *a*)
Ditto ditto .. In Hindi. 3 *p* (1 *a*)

Act XXXVII of 1850 (Public Servants Inquiries), as modified up to 1st August, 1908 .. .. In Urdu. 9 *p* (1 *a*)
Ditto ditto ... In Nagri 9 *p* (1 *a*)

Act XIII of 1857 (Opium), as modified up to 1st August, 1908 . In Urdu 9 *p* (1 *a*)
Ditto ditto .. In Nagri. 9 *p* (1 *a*)

Act IX of 1859 (Forfeiture), as modified up to 1st October, 1908 In Urdu 3 *p*. (1 *a*)
Ditto ditto ... In Nagri 3 *p* (1 *a*)

Act XVI of 1863 (Excise), as modified up to 1st October, 1908 .. In Urdu. 3 *p* (1 *a*)
Ditto ditto . In Nagri. 3 *p* (1 *a*)

Act XXXI of 1863 (Official Gazette) with footnotes .. ... In Urdu 3 *p* (1 *a*)
Ditto ditto . In Nagri 3 *p*. (1 *a*)

Act XV of 1864 (Indian Tolls), as modified up to 30th June, 1909 .. In Urdu 3 *p* (1 *a*)
Ditto ditto . In Nagri 3 *p* (1 *a*)

Act X of 1865 (Succession) as modified up to 1st April, 1909 . In Urdu. 11 *a* 3 *p*. (2 *a*)
Ditto ditto .. In Nagri 11 *a* 3 *p*. (2 *a*)

Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August, 1908 ... .. ... ... ... In Urdu 3 *p* (1 *a*)
Ditto ditto ... In Nagri 6 *p*. (1 *a*)

Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907 ... ... . In Urdu 1 *a* 3 *p* (1 *a*)
Ditto ditto ... In Nagri 1 *a* 3 *p* (1 *a*)

Act V of 1870 (Unclaimed Deposits), as modified up to 1st October, 1908 . ... ... In Nagri 3 *p* (1 *a*)

Act VII of 1870 (Court fees), as modified up to 1st February, 1909 ... In Urdu 5 *a* 9 *p* (1 *a*)
Ditto ditto ... In Nagri 5 *a* 6 *p* (1 *a*)

Act XXVII of 1871 (Criminal Tribes), as modified up to 1st September, 1908 .. . . ... In Urdu 1 *a* 3 *p* (1 *a*)
Ditto ditto ... In Nagri 1 *a* 3 *p* (1 *a*)

Act I of 1872 (Evidence) as modified up to 1st May 1908 ... ... In Urdu 8 *a* (2 *a*)
Ditto ditto ... In Nagri 8 *a* (2 *a*)

Act I of 1878 (Opium) as modified up to 1st October, 1907 .. In Urdu. 1 *a* 6 *p* (1 *a*)
Ditto ditto . In Nagri 1 *a*. 6 *p*. (1 *a*)

Act XII of 1880 (Kazis) with footnotes . ... In Urdu. 3 *p*. (1 *a*)

Act II of 1882 (Trusts) as modified up to 1st June 1909 In Nagri. 3 *a*. 6 *p*. (1 *a*)

Act XIII of 1889 (Cantonments), as modified up to 1st October, 1907 ... ... ... .. ... In Urdu. 3 *a*. (1 *a*. 6 *p*.)

the Statute Book and if Act No. XIV of 1882 were still in force the present proceedings would not be barred.

This Court held in *Pahalwan Singh* v. *Narain Das* (1) that a decree like the present in which provision is made for the enforcement of the decree against immovable property did not come within the provisions of section 230 of Act No XIV of 1882 Section 48 of Act No V of 1908 has been so worded as to include and govern applications for execution of all decrees save and excepting only decrees for injunctions.

The question then that arises for decision is whether Act No XIV of 1882 having been completely repealed, Act No V of 1908 can operate so as to bar the right which the decree holder had before Act No V of 1908 came into force and still would have but for its enactment if it applies.

The learned vakil for the appellant contended that the question before us is not merely a question of procedure, and that the right which the appellant had cannot be curtailed unless by some enactment which is expressly declared to have retrospective effect. In support of his contention he referred us to *Jug Ram* v. *Jewa Ram* (2), *Thakur Prasad* v *Ahsan Ali* (3), *Gokul Singh* v. *Birj Lal* (4) and *Deb Narain Dutt* v *Narendra Krishna* (5)

All of these cases except the first were cases in which the Court considered the effect of section 6 of Act No I of 1868 upon proceedings which had been commenced before the Act under which they had commenced had been repealed, and it was held broadly that unless the 6th section of the General Clauses Act of 1868 had been excluded by the repealing Act, its effect was to leave proceedings initiated before the repealing Act came into force, to be dealt with under the provisions of the repealed Act and that retrospective effect is not ordinarily given to an enactment so as to affect substantive rights

Section 6 of Act No VII of 1897 has now taken the place of section 6 of Act No I of 1868 Its terms are much wider than the terms of section 6 of Act No I of 1868 and it enacts *inter alia* that unless a different intention appears in the repealed Act, the repeal shall not affect any right, privilege, obligation or

(1) (1900) I L R, 22 All 401
(2) (1909) 6 A L J, 647
(3) (1878) I L R, 1 All, 668.
(4) Weekly Notes, 1885, p 130
(5) (1889) I. L R, 16 Calc, 267.

## V.—MISCELLANEOUS PUBLICATIONS

Table showing Effect of Legislation in the Governor General's Council during 1906 ... ... .. ... .. 3a 6p (1a

Ditto ditto during 1907 ... 2a 6p (1a

Ditto ditto during 1908 ... 4a (1a)

Ditto ditto during 1909 ... 3a 3p (1a

Annual Indexes to the Acts of the Governor General of India in Council for 1906, 1907, 1908 and 1909. The price is noted on them

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date Super royal 4to Annual subscription Rs. 5 (Re. 1); single issue 4a, including postage

List of General Rules and Orders under Statutes and General Acts in force in British India Corrected up to 31st December, 1908 ... Rs 1-4-0. (3a)

Addenda and Corrigenda List No. 1 of 1909 to the List of General Rules and Orders .. ... ... .. ... 3p (1a)

Ditto ditto No II of 1909 ... 7a 6p (1a)

Chronological Tables of the Indian Statutes compiled under the orders of the Government of India by F. G. Wigley, of the Inner Temple, Barrister at Law. Edition 1909 ... ... ... Rs 4 (5a)

A Digest of Indian Law Cases, containing the High Court Reports and Privy Council Reports of Appeals from India, 1901-03, with an Index of cases, compiled under the orders of the Government of India, by F. G. Wigley, of the Inner Temple, Bar.-at-Law. Edition 1905 Rs 10 Reduced to Rs 3 per copy ... ... (10a)

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India, 1904, with an Index of cases, compiled under the orders of the Government of India, by C E Grey, Bar.-at-Law, Edition 1907 Re 1, 4a Reduced to Re 1 per copy .. ... ... .. (5a)

Ditto ditto 1905, by C E. Grey, Bar.-at-Law, Edition 1907 Re 1-4. Reduced to Re 1 per copy ... (6a)

Ditto ditto 1906, by C E Grey Bar.-at-Law, Edition 1908 Rs 1 4 Reduced to Re 1 per copy .. (6a)

Ditto ditto 1907, by B D. Bose, Bar.-at-Law, Edition 1908 Re. 1 4 Reduced to Re. 1 per copy ... (5a)

Ditto ditto 1908, by C. E. Grey, Bar.-at-Law, Edition 1910 .. .. .. . Rs 2 (5a)

Set of Digests from 1901—1907 Reduced to Rs 7 per set of 5 volumes) .. ... .. ... ... (Rs 2)

General Rules and Orders made under enactments in force in British India consisting of General Rules, Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index In three Volumes Rs 15 Reduced to Rs 10 per set (Rs 2) or Rs 5 per Volume ... (12a)

Volume IV in the Press

Title page and Contents of the Acts passed by the Governor General of India in Council in the year 1907 ... . . 1a 6p (1a)

Ditto ditto 1908 .. ... 5a 9p (1a)

Ditto ditto 1909 ... .. 3a 3p (1a)

therefore not to be extended to cases which are not strictly within the enactment.

I would therefore decree this appeal, and, setting aside the decrees of the courts below, remand the proceedings through the lower appellate court to the court of first instance with directions to re-admit the proceedings under the original number in the register of execution proceedings and to proceed to determine them. Costs here and hitherto will abide the event.

KARAMAT HUSAIN, J.—I have had the advantage of reading the judgement of my learned brother and I entirely agree with him and in the order proposed by him.

*Appeal decreed and cause remanded.*

---

*Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.*

MUHAMMAD IBRAHIM KHAN (PLAINTIFF) *v.* AHMAD SAID KHAN AND ANOTHER (DEFENDANTS).*

*Civil Procedure Code (1908), schedule II and section 92—Muhammadan law—Waqf—Public charitable trust—Dispute as to right to succeed as mutawalli—Arbitration.*

A trust for charitable purposes being a trust of a public character, the right to succeed to the trusteeship of such a trust is not a right which can be settled by arbitration. a court therefore has no jurisdiction to entertain an application to file an award in such a matter under section 20 of the second schedule to the Code of Civil Procedure, 1908. *Mahadeo Prasad* v. *Bindeshri Prasad* (1) referred to.

THE facts of this case were as follows:—

One Ghulam Chishti Khan created a *waqf* and was the first *mutawalli* After his death his second son, Abdul Karim Khan, became *mutawalli*. On the death of Abdul Karim Khan, disputes arose as to the succession between two other sons of Ghulam Chishti Khan on one side, and Ahmad Said Khan, a son of Abdul Karim Khan, on the other. The parties referred the dispute to private arbitration, and an award was made in favour of the appellant, one of the sons of Ghulam Chishti Khan. He applied to have the award filed in court. Ahmad Said Khan contested the application on the basis of various objections which he urged against the validity of the award. The

---

* First Appeal No. 79 of 1909, from an order of Nihal Chandra, Subordinate Judge of Moradabad, dated the 12th of June, 1909.

(1) (1903) I. L. R., 30 All., 137.

## V.—MISCELLANEOUS PUBLICATIONS

Table showing Effect of Legislation in the Governor General's Council during 1906 ... ... ... ... ... 3 *a.* 6 *p.*

Ditto ditto during 1907 ... 2 *a* 6 *p.*

---

of India in Council in the year 1907 ... ... ... 1 *a.* 6 *p* (1 *a.*)

Ditto ditto 1908 ... ... 5 *a.* 9 *p* (1 *a*)

Ditto ditto 1909 ... .... 3 *a* 3 *p.* (1 *a*)

apply, the Act, instead of prohibiting a settlement by arbitration, has expressly provided for it by sections 16 and 17 As to section 92 of the Code of Civil Procedure, it has no application to the circumstances of the present case That section is applicable where there is any alleged breach of trust, or where the direction of the court is deemed necessary for the administration of a trust It does not apply to the case of the appointment of a trustee on the death of another trustee—clause (*a*) and (*b*) taken together indicate that the section is applicable when a trustee is removed and a new trustee is appointed in his place The right of a person to hold the office of *mutawalli* is a private right and nothing more A right is either private or public, in the latter case one of the parties must be the State Holland, *Jurisprudence*, pages 111, 12 Here, the matter in dispute is whether A or B shall succeed, under the terms of a certain will, to the office of *mutawalli*, it is not a question between A or B on the one part and the State on the other. And the State cannot interfere or intervene in such a matter, for there is no law in India under which the State can claim to hold and manage public charitable dispositions In India the functions of the State in the matter of public charities, &c, are very limited, it cannot interfere excepting under the circumstances mentioned in section 92 of the Civil Procedure Code A suit under that section, of course, always relates to a public right and not a private right, *Miya Vali Ulla* v *Sayad Bava Saheb Santi Miya* (1) The matter in suit does not come under section 92

The next question is, whether a reference to private arbitration of a dispute relating to succession to a *mutawalliship* is opposed to any general policy of the law, or is in any other way prohibited There is no doubt that the present dispute could be referred to arbitration through the court, if a suit had been instituted about it, the matter could then at once have been referred to arbitration The language of section 1 of the second schedule to the Civil Procedure Code is wide and unqualified. It refers to 'any matter in difference" Dr C Banerji *Law of Arbitration*, page 20 If a regular suit about this matter could

(1) (1896) I L R 22 Bom 496

*Muhammadan Law*, Vol I, 3rd edition, page 391; Baillie, *Digest of Muhammadan Law*, p. 603 When a special jurisdiction is conferred upon the District Judge, as by section 92, Civil Procedure Code, or by the Guardians and Wards Act, or by the Probate and Administration Act no other court or tribunal has jurisdiction in the matter, nor can the powers of the District Judge be delegated or abrogated by arbitration; *Mahadeo Prasad* v *Bindeshri Prasad* (1), *Sham Lal* v *Bindo* (2), *Monmohini Guha* v *Banga Chandra Das* (3), and *Karedla Vijayaraghava Perumalayya Naidu* v *Vemavarapu Sitaramayya* (4) The matter in dispute comes within and is governed by section 92, clause (b) The appointment of a new trustee does certainly come within section 92, it is a matter in which "the direction of the court is," certainly, "deemed necessary" Clauses (a) and (b) of section 92 are quite independent of each other A new trustee has to be appointed not only when the old trustee is removed, but also when he dies or the office becomes vacant

The case in I L R, 22 Bom, 496, was a case under the old Civil Procedure Code The addition of sub-section (2) to section 92 is new and important. Moreover, there the trustee was to get some benefit for himself as well, he was not merely a trustee, but a beneficiary too Since the enactment of sub section (2), section 92, the law must be taken to be as laid down therein, and not as laid down in prior decisions, *Norendra Nath Sircar* v *Kamalbasini Dasi* (5) Section 92 is exhaustive of the law on the subject of appointment of trustees, and exclusive jurisdiction is given by it to the District Judge, and to no other tribunal.

Again, how will the private decision by arbitration bind the others who are interested in the subject-matter of the *waqf*? It is binding only between the two disputants A second pair of disputants may arise, who may refer their dispute to arbitration and the arbitrators may appoint one of them as trustees The result will be a plurality of trustees, none of whom will have a better right than the rest. But an appointment by the District

(1) (1908) I L R, 30 All, 137
(2) (1904) I L R 26 All. 594
(3) (1903) I L R, 31 Calc, 357.
(4) (1902) I L R, 26 Mad, 361.
(5) (1896) I L R, 23 Calc., 563.

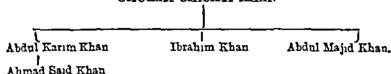
These, as well as the case in I L R, 22 Bom, 496 were cases in which the plaintiff sued to be declared or appointed a trustee, although in I. L R, 22 Bom, and I L R, 33 Bom., 509, there were other reliefs also claimed, and section 539 of the old Code was held not to apply to such suits A suit merely for the appointment of a trustee, where there is no question of breach of trust by anybody, cannot lie under section 539 If a stranger usurps, he can be sued to be turned out, but not under section 92 Or if two or more persons have a dispute, the matter can be adjudicated by the court, but again, not under section 92 Section 92 gives no general power of appointment or administration The word "new" trustee shows that it is only when and "old" trustee is removed that another can be appointed under that section

The cases in I L R, 26 All, 594 and I L R, 26 Mad, 391, can be distinguished, and the case in I L R, 31 Calc, 357, was altogether a different case

Then again, no objection had been taken by the other side in the lower court as to the validity of the reference to arbitration Caspersz, *Modern Estoppel and Res judicata*, pages 333 and 335

The case reported in I L R, 11 All, 14 shows that breach of trust is not a *sine qua non* for the application of section 539 There was allegation of breach of trust in that case The case in I L R, 33 Cal, 789, goes much beyond that case The conditions are laid down in that case as well as in Ameer Ali's Code of Civil Procedure already referred to

KNOX and KARAMAT HUSAIN, JJ —The following genealogical table will show the relation of the parties —




Gulam Chishti Khan by his will, dated 10 Safar, 1284, H., corresponding to the 16th June, 1897, created a *waqf* of certain immovable property "to defray the expenses of the poor, the *faqirs*, the orphans, the needy and the indigent, and to defray

As the term charity has been imported from the English Law, it is desirable to give a definition of that term as understood in that law. The preamble to the Statute 43 Elizabeth C IV contains an enumeration of charitable objects. The relief of aged, impotent and poor people is among these objects. See Tudor on Charities, page 36, 4th edition. The same author on page 37 says :—"The purposes which have been held charitable within the language or spirit of this preamble, may be grouped under four heads :—* (1) the relief of poverty, (2) education, (3) the advancement of religion, (4) other purposes beneficial to the community not falling under any of the preceding heads. These may be conveniently termed 'general public purposes'" * * * "In the first place it may be laid down as a universal rule that the law recognizes no purpose as charitable unless it is of a public character, † that is to say, a purpose must, in order to be charitable be directed to the benefit of the community or a section of the community. ‡ The distinction between a public purpose and one which is not public is often fine. The principle deducible from the cases seems, however, to be as follows:—If the intention of the donor is merely to benefit specific individuals, the gift is not charitable, even though the motive of the gift may be to relieve their poverty or accomplish some other purpose in reference to those particular individuals which would be charitable if not so confined; on the other hand, if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education or religion or other purpose charitable, within the meaning of the Statute of Elizabeth, without reference to any particular individuals and without giving any particular individuals the right to claim the funds, the gift is charitable."

Lord Halsbury, L. C., in *Commissioners of Income Tax v. Pemsal* (1) says :—"To come now to the particular bequests before

* *Morice* v *Bishop of Durham* (1804) 10 Ves 533 (Arg), *Commissioners of Income Tax* v *Pemsal* [1891] A. C, 583 *per* Lord MACNAGHTEN, *Re Foveaux* [1895] 2 Ch 505, *Re Macduff*, [1896] 2 Ch 466.

† *Jones* v *Williams*, (1767) Amb, 651, *Commanney* v *Butcher*, (1823) T and R. 273, *Goodman* v *Mayor of Saltash* (1882) 7 A C, 650, *Re Christ Church Enclosure Act*, (1888) 38 Ch D, 532

‡ *Re Foveaux*, [1895] 2 Ch 501 *Re Main* [1903] 1 Ch 232

(1) [1891] A C 531 at 552.

the property, to institute proceedings for the protection of charities"

The same author at page 363 says —"The proper and formal shape of a suit for determining the mode in which the funds belonging to a charity should be administered, was by the information of the Attorney-General* The Attorney General appeared before the court not as an ordinary plaintiff, endeavouring to obtain redress for a private wrong, but rather as one officer of the Crown informing the Judge, another officer of the Crown, of some neglect on the defendant's part in the performance of a public duty, and demanding a remedy. Hence the name 'information' was applied to a suit of this nature" See also the Privy Council case of *Attorney General* v *Brodie* (1), the last portion of the head note in which is as follows —"By 53 Geo III, C 155, section 111, the Advocate-General is entitled to appear and represent the Crown in informations for the administration of charitable funds"

The above extracts, in our opinion, conclusively establish that the office of a trustee to a public charity, is not a right disputes about which can be settled by arbitration A party can refer a matter of a private individual right of a civil nature to arbitration, but he has no power to refer a matter which is not purely of a private civil character, and it is on this ground that a Bench of this Court in *Mahadeo Prasad* v *Bindeshri Prasad* (2) held that the appointment of a guardian to a minor not being a matter of a private right as between parties, was not a question which could be settled by reference to arbitration AIKMAN, J, towards the end of his judgement says —"If rival claimants to a certificate of guardianship are allowed to refer their disputes to arbitration, a door would be opened to collusion and the interests of the minors would suffer" These remarks, in our opinion, apply with greater force to an attempt to have the right of succession to the trusteeship of a public charity settled by arbitration If that were allowed, a very wide door for collusion, misfeasance and malfeasance in respect of trust property would be opened

* Per WIGRAM V C *Governors of Christ's Hospital* v *A G*, (1846) 5 Ha 257

(1) (1846) 4 Moo I A, 190 (2) (1908) I. L. R 30 All, 137.

words 'when the direction of the Court is deemed necessary for the administration of such trust"

The Hanafi law on the subject is as follows —"When the superintendent is dead and the appropriator is still alive the appointment of another belongs to him and not to the Judge If the appropriator be dead, his executor is preferred to the Judge, but if he has died without leaving an executor, the appointment of an administrator is with the Judge" Baillie, Hanafi law, pp 603 and 604 "In the case where a descendant or relative of the *waqif* is not willing to accept the office without a salary and an outsider is willing to accept it without a salary, the Qazi should see whose appointment would be most beneficial to the *waqf* and who is fittest for the appointment" The above extracts go to show that the appointment of a *mutawalli* to *waqf* property, in the absence of anything in the deed of *waqf* vests with the Qazi In this connection, see *Muhammad Sabir* v *Muhammad Ali* (1) and The *Advocate General* v *Fatima Sultani Begam* (2)

It may, however, be said that the adjective law of the Hanafi School has been superseded by the adjective law of British India This, however, cannot affect the case before us, inasmuch as we are dealing with the substantive law of arbitration and not with its procedure

It is contended by the learned advocate for the appellant that under the Charitable Trusts Act, 1853,* disputes among members of any charity in relation to the management of the charity may be referred to the arbitration of Charity Commissioners (see Russell on Arbitration, 9th edition, page 22) and by analogy a dispute regarding the succession to the office of trusteeship may be referred to arbitration There is no force in this contention, inasmuch as a special Statute allows certain disputes relating to the management of charities to be referred to arbitration, and in the absence of any express statutory provision to that effect in British India, we are not prepared to hold that a dispute regarding succession to the trusteeship of a public charity can be referred to arbitration In the

* 16 and 17 Vic c 137 s 64 See also 18 and 19 Vict c 124 s 46

(1) (1798) 1 S D A 17 (2) (1872) 9 Bom. H. C Rep, 19.

said to be written by Nityanand Prasad Singh, on the 22nd January, 1906, amounted to payment and acknowledgment as are intended by sections 19 and 20 of the Indian Limitation Act, 1877. We hold that neither the alleged payment nor the alleged letter amounts to a payment or acknowledgment intended in those sections. We dismiss the appeal in both the cases with costs.

*Appeal dismissed.*

## PRIVY COUNCIL.

KHWAJA MUHAMMAD KHAN (DEFENDANT) *v.* HUSAINI BEGAM (PLAINTIFF)

[On appeal from the High Court of Judicature at Allahabad.]

*Marriage amongst Muhammadans—Agreement by father-in law of bride to pay annuity to her in consideration of her marriage to his son—"Kharch-i-pandan"—"Pin-money"—Right to sue of person not party to agreement—Agreement on behalf of minors—Refusal to live with husband—Unconditional agreement to pay allowance.*

In accordance with an arrangement made between the defendant and the father of the plaintiff (then a minor) on the occasion and in consideration of her marriage with the defendant's son (also a minor), the defendant executed a document whereby he agreed to "continue to pay the sum of Rs. 500 a month in perpetuity" to the plaintiff for her "pandan (betel nut expenses" &c) "from the date of the marriage, *i e*, from the date of her reception," and made the payment of the allowance a charge on certain immovable property specified in the agreement The plaintiff's reception into her husband's house took place in 1883 The husband and wife lived together till 1896, when owing to differences she left her husband's home and resided elsewhere, when the defendant stopped the payments In a suit to recover arrears of the allowance *Held* (affirming the decision of the High Court) that the plaintiff, though not a party to the agreement was entitled in equity to enforce her claim.

*Tweddle v. Atkinson* (1) distinguished as being an action of assumpsit and decided on a rule of common law inapplicable to the circumstances of the present case, in which the agreement specifically charged immovable property with the payment of the allowance, and the plaintiff was the only person beneficially entitled under it.

In India and amongst communities circumstanced as were Muhammadans, among whom marriages were contracted for minors by parents and guardians, serious injustice might be occasioned if the common law doctrine were applied to agreements or arrangements entered into in connexion with such contracts.

*Held* also that the allowance for "kharch-i pandan," though having some analogy in its nature to the English "pin money" stood on a different legal

*Present*—Lord MACNAGHTEN, Lord COLLINS, Sir ARTHUR WILSON and Mr. AMEER ALI

(1) (1861) 1 B. & S. 393.

alleged infringement of an individual right, and, as such is clearly not within the section "

With reference to the above remarks the learned advocate for the appellant says that a dispute regarding the succession to the *tawliat* (trusteeship) of a *waqf*, may be referred to arbitration

These remarks cannot be deemed to support his contention They only specify the scope of section 539

For the above reasons we hold that the right to succeed to the *tauliat* (trusteeship) of *waqf* property is not a right which can be settled by reference to arbitration, and that the court below had no jurisdiction to entertain an application for filing the award in court under section 20, schedule II, of the present Code of Civil Procedure

The result is that the appeal fails and is dismissed We make no order as to costs

*Appeal dismissed*

## MISCELLANEOUS CIVIL

*Before Mr Justice Tudball*

BHOLA NATH AND ANOTHER (DEFENDANTS) *v* PARSOTAM DAS AND OTHERS (PLAINTIFFS) *

*Act No VII of 1870 (Court Fees Act) section 7; schedule II clauses 3 4—Suit for dissolution of partnership—Preliminary decree—Appeal—Court fee*

In a suit for dissolution of partnership the defendants appealed against the preliminary decree pleading that they had no interest in the partnership, and that they sought only a declaration to that effect *Held* that the appellants ought to pay an *ad valorem* fee according to the amount at which the relief sought was valued in the memorandum of appeal

THIS was a reference by the taxing officer to the Taxing Judge under section 5 of the Court Fees Act, 1870, arising out of an appeal against the preliminary decree in a suit for dissolution of partnership and accounts The plaintiffs alleged that the defendants had an interest in the partnership to the extent of $\frac{6}{16}$ The defendants denied having any interest The court below held in favour of the plaintiffs and passed a preliminary decree for dissolution and accounts The defendants appealed and paid a court

* Stamp Reference in First Appeal No 146 of 1910

*DeGruyther, K.C.*, and *Cowell* for the respondent were not called on.

1910, *June 7th*:—The judgement of their Lordships was delivered by MR. AMEER ALI:—

The suit which has given rise to this appeal was brought by the plaintiff, a Muhammadan lady, against the defendant, her father-in-law, to recover arrears of certain allowance, called *kharch-i-pandan*, under the terms of an agreement executed by him on the 25th October, 1877, prior to and in consideration of her marriage with his son Rustam Ali Khan, both she and her future husband being minors at the time.

The agreement in question recites that the marriage was fixed for the 2nd November, 1877, and that "therefore" the defendant declared of his own free will and accord that he "shall continue to pay Rs. 500 per month in perpetuity" to the plaintiff for "her betel-leaf expenses, etc., from the date of the marriage, i.e., from the date of her reception," out of the income of certain properties therein specifically described, which he then proceeded to charge for the payment of the allowa

Owing to the minority of the plaintiff, her "rec

the conjugal domicile to which reference is mad

does not appear to have taken place until

and wife lived together until 1896, when, o

she left her husband's home, and has since

continuously at Moradabad.

The defendant admitted the execution of which the suit is brought, but disclaimed liability grounds, viz, (1) that the plaintiff was no party and was consequently not entitled to maintain the that she had forfeited her right to the allowance her misconduct and refusal to live with her husband

Evidence of a sort was produced to establish the of misconduct, but the Subordinate Judge considered not "legally proved." In another place he expresses himself thus —"Although unchastity is not duly proved, yet I have no hesitation in holding that plaintiff's character is not free from suspicion." Their Lordships cannot help considering an of this kind regarding a serious charge as unsatisfactory.

duty computed according to the valuation given in the memorandum of appeal. An appeal from a preliminary decree *is generally valued at the same amount as that* at which the suit is valued—it being an appeal in a suit for accounts—while an appeal from a final decree is valued at the difference between the amounts alleged as due on one side and the other—the latter being an appeal questioning the result of the accounts

"The upshot of the appellants' objection is that as the Legislature has, by enacting section 97 of the new Code, made it compulsory for the party aggrieved by a preliminary decree to appeal against it *within the period of limitation*, it works a great hardship upon them to be called upon to pay *ad valorem* court fees twice over. I submit that in enacting the above section, the Legislature has only given effect to the principle laid down in *Boloram Dey* v. *Ram Chundra Dey*(1) which was over ruled in a later Full Bench decision of the said Court in *Khadem Hosein* v *Emdad Hossein*(2) The Legislature has not thereby effected any change in the law relating to court fees payable on such appeals So that as it may what we are concerned with is to see whether the fee paid is in accordance with the law on the subject This is a suit for accounts and the learned vakil for the appellants does not deny this Turning to section 7, clause iv*(f)*, we find that in a suit for accounts, the court fee is to be computed according to the valuation given in the plaint or memorandum of appeal The mention of the words "Memorandum of appeal" I submit, in clause iv to section 7 of Act VII of 1870, is significant, for, in other clauses to that section which deal with different classes of cases, the words quoted above have been omitted and the word "suits" only occurs. It therefore follows that in cases dealt with by this clause, a memorandum of appeal has to be charged with *ad valorem* fee calculated on the valuation given therein Please see the case of *Ladubhai Premchand* v. *Revichand Venichand*(3)

"Article 17, clause ii of schedule II of Act VII of 1870, referred to by the learned vakil for the appellant has no application It applies to cases of quite a different nature The present suit was not one for declaration but for accounts, and it is expressly provided for by section 7, clause iv *(f)*.

"For the reasons stated above I submit that the court fee payable on this memorandum of appeal should be *ad valorem*

"Further, I submit, that by dint of section 8 of Act VII of 1887, the value for computation of court fee is the same as that for purposes of jurisdiction. Its provisions apply to appeals also (*vide* I. L R, 18 Bom, 207)"

Babu *Girdhari Lal Agarwala*, for the appellants, replied as follows:—

"In the present appeal, the only question is whether or not the appellants are partners in the firm Ram Lal Bankey Lal. The relief sought is only a declaration that the appellants are not partners and so under schedule II, article 17 (iii) a fixed fee of Rs. 10 has been paid. Article 17 (vi) would also seem to apply inasmuch as the relief sought in appeal, as far as the appellants are concerned is incapable of accurate valuation The valuation put in the memorandum

(1) (1895) I. L. R., 23 Calc., 279. (2) (1901) I L R., 29 Calc, 753.
(3) (1881) I. L. R, 6 Bom, 143.

It has, however, been urged with some force that the allowance for which the defendant made himself liable signifies money paid to a wife when she lives with her husband, that it is analogous in its nature to the English pin-money, over the application of which the husband has a control, and that, as the plaintiff has left her husband's home and refused to live with him, she has forfeited her right to it.

*Kharch-i-pandan*, which literally means "betel-box expenses," is a personal allowance, as their Lordships understand, to the wife customary among Muhammadan families of rank, especially in upper India, fixed either before or after the marriage, and varying according to the means and position of the parties. When they are minors, as is frequently the case, the arrangement is made between the respective parents and guardians. Although there is some analogy between this allowance and the pin-money in the English system, it appears to stand on a different legal footing, arising from difference in social institutions. Pin-money, though meant for the personal expenses of the wife, has been described as "a fund which she may be made to spend during the coverture by the intercession and advice and at the instance of the husband." Their Lordships are not aware that any obligation of that nature is attached to the allowance called *kharch-i-pandan*. Ordinarily, of course, the money would be received and spent in the conjugal domicile, but the husband has hardly any control over the wife's application of the allowance, either in her adornment or in the consumption of the article from which it derives its name.

By the agreement on which the present suit is based the defendant binds himself unreservedly to pay [illegible] plaintiff fixed allowance; there is no condition that whilst the wife is living in the husband's [illegible] bility should cease whatever the circu[illegible] she happens to leave it.

The only cond[illegible] relates to the time cumstances und[illegible] his liability is fixed with her [illegible] into her h[illegible] under the Muh[illegible] law, the re[illegible] rights and obliga[illegible] into existe[illegible]

to it. Before the enactment of the new Code rulings on this point differed, but there can be no doubt that a party could, if he wished, appeal separately against a preliminary decree

"All this is only relevant to the point at issue in so far as it relates to the question whether the alteration in the law has in any way affected the method in which the court fee payable on an appeal against a preliminary decree should be completed. The office contends that it has not In so far as it appears to me that alteration in the law has merely cleared up a doubtful point as to the necessity for filing a separate appeal against a preliminary decree, I think the contention of the office is correct

"The practice in this Court under the old law was that when an appeal against a preliminary decree was separately filed it as well as the appeal against the final decree was stamped *ad valorem* From the ruling in *Ladubhai Premchand* v *Raichand Temchand*(1) this would appear to have also been the custom in Bombay It is also noteworthy that from the wording of the judgement in that case, there appears to have been no question but that the appeal if treated as an appeal against a *decree*, would have to be stamped *ad valorem* The learned council for the appellants in the present case contends that the appeal is governed by schedule II article 17 (iii) of the Court Fees Act he also suggests that it would be unfair to require a suitor to pay *ad valorem* fees both in his preliminary as well as in his final appeal The reply to the latter part of his argument seems to me to be that this has always been the practice and that as far as the method of computing the court fee is concerned the law has not been altered The first point of his argument however brings forward what to my mind is the real crux in the case and that is does or does not the decree asked for which is admittedly a declaratory decree involve consequential relief? In my judgement this question should be answered in the affirmative Most important consequential relief will accrue to the appellants in event of success They will in that case be relieved of the responsibility for accounting for any share of the profits of the partnership business

"The learned counsel has also referred to schedule II, article 17 (vi) of the Court Fees Act This I do not think can apply as the subject matter in this appeal is essentially capable of valuation

"As the whole question is not free from difficulty, I refer it for your decision"

TUDBALL, J.—The question which has been referred to me for decision by the Taxing Officer is whether this appeal be stamped with an *ad valorem* fee or should bear a fixed fee of Rs. 10. The suit out of which this appeal has arisen is a suit for dissolution of partnership and for taking of accounts For the purposes of court fees this suit falls under section 7, clause iv *(f)* of the Court Fees Act, and an *ad valorem* fee is to be paid according to the amount at which the relief is valued in the plaint. The court

(1) (1881) I. L. R., 6 Bom., 143.

brothers (who had separated himself in 1865 after a quarrel with his elder brother, taking a third share of the property) and the respondent was the third brother The court of the Judicial Commissioner (reversing the decision of the Subordinate Judge) held on the evidence and circumstances of the case and the inferences to be drawn as to the intention of the Government in making the grant and from its terms and the conduct of the parties that the estate granted was the joint property of the three brothers up to the time when the second brother separated that the other two brothers remained joint until the death of the eldest brother in 1869 when the respondent became entitled by survivorship to two-thirds of the property, and that the appellants had altogether failed to prove that the eldest brother died entitled to either two-thirds or one-third of the Sherpur estate as separate property That court consequently dismissed the suit and the Judicial Committee on appeal affirmed that decision.

APPEAL from a decree (4th May, 1906,) of the court of the Judicial Commissioner of Oudh at Lucknow, which reversed a decree (24th March, 1905,) of the Subordinate Judge of Sitapur

This appeal arose out of a suit brought by Kedar Nath, the first appellant, and one Umrao Singh deceased, now represented by Sirpal Singh and Sarabjit Kuar, the second and third appellants, to recover possession from the defendant Ratan Singh (the present respondent) of a one third, or in the alternative a one sixth share of an estate called Sherpur The plaintiffs case was that the Sherpur estate belonged to one Gaya Din Singh, brother of the plaintiff Umrao Singh and of the defendant Ratan Singh, that Gaya Din Singh died in 1869, and was succeeded by his widow Lochan Kuar, who died in 1896, and that on her death Umrao Singh and Ratan Singh each became entitled to half the estate that had been in her possession In the alternative the plaintiffs said that if Gaya Din was held to have been the owner of only one third of the estate, then they claimed half of that one-third, or one-sixth of the whole

The main question for determination in the appeal was whether the property in dispute was the property of Gaya Din alone or of the family represented by him

According to the plaintiffs' statement the circumstances which led to the suit were as follows —

At the annexation of Oudh Gaya Din Singh, the elder brother of Umrao Singh and Ratan Singh, was the holder of a taluq of which the estate of Sherpur represented about a third part This taluq was included in the general confiscation in 1858, but was

# APPELLATE CIVIL.

*Before Mr Justice Richards and Mr Justice Tudball*

MUHAMMAD NASAR-ULLAH KHAN (OPPOSITE PARTY) *v* MUHAMMAD ISHAQ KHAN (APPLICANT) *

*Act (Local) No III of 1901 (United Provinces Land Revenue Act), sections 111 112—Partition—Lands held under a private partition claimed by non-applicant—No question of proprietary title—Appeal*

When in a suit for partition of revenue paying lands one of the non applicants alleged that under a private partition he was in possession of certain lands and claimed those lands for himself and the Collector in appeal ordered those lands to be given to him *Held* that no question of proprietary title was raised and no appeal lay to the District Judge against the order of the Collector *Tulsi Ram* v *Gate Ram* (1) followed *Muhammad Jan* v *Sadanand Pande* (2) distinguished

THIS was an appeal arising out of an application for partition of revenue paying lands made by one Muhammad Ishaq Khan. One of the non applicants, Muhammad Nasar-ullah Khan, raised objections to the effect that there had already been a private partition of the property in question, and that he was entitled to remain in possession of the property which had been thereby awarded to him, but did not deny that the property was originally the joint property of the parties These objections were disallowed by the first court (Assistant Collector) Nasar ullah Khan appealed to the Collector of the district who sustained his objections and modified the order of the Assistant Collector, directing that "the lots of the private partition be regarded as the severalty of their owners" From this order the applicant appealed to the District Judge, who entertained the appeal and reversed the Collector's order Nasar ullah Khan appealed to the High Court upon the main ground that no question of proprietary title was raised in the case and therefore no appeal lay to the District Judge

Mr *W K Porter* (with him Maulvi *Ghulam Mujtaba*), for the appellant

Maulvi *Muhammad Ishaq* (with him Mr *B E O'Conor*), for the respondent.

---

* Second Appeal No 219 of 1909 from a decree of H J Bell District Judge of Aligarh dated the 23rd of January 1909 reversing a decree of G O W Ingram Collector of Aligarh dated the 16th of March 1907

(1) Weekly Notes 1901 p 225 (2) (1906) I L R., 28 All. 394.

Lochan Kuar died on 29th August, 1896, and Ratan Singh obtained possession of the lands now in suit to the exclusion of his brother Umrao Singh

The present suit was instituted on 15th October, 1900 Umrao Singh obtaining money for the purpose from the first plaintiff by mortgaging his rights in the property in suit

The defence was that the estate of Sherpur was previous to 1865 the joint property of the three brothers, that *Umrao Singh* separated from them in 1865 leaving Gaya Din Singh and Ratan Singh in joint possession of two thirds of the estate, and that on the death of Gaya Din, Ratan Singh became entitled to the entire two third, but allowed Lochan Kuar to remain in possession for her life The defendant also set up a title under a will made by the widow, and further pleaded limitation on the ground of adverse possession for more than 12 years

Of the issues settled the following only are now material —

"(1) Was the property in question the self acquired property of Gaya Din or did it belong to the family consisting of the parties and Gaya Din, the latter being a managing member, and was the property treated as being a joint family property?

(2) Whether plaintiff separated in 1273 Fasli (1866) from Gaya Din, and the defendant remained joint?

(5) Whether plaintiff is entitled to a moiety of the estate left by Lochan Kuar on her death?

(8) Did Lochan Kuar remain in possession of the estate on behalf of Ratan Singh and with his consent?

(9) Whether or not the suit is within limitation?"

On the first issue the Subordinate Judge held that the property was the self acquired property of Gaya Din, and on the fifth issue he said —"I have found above that the property was really acquired property of Gaya Din, that Ratan Singh was not joint with him in the property, and that Gaya Din Singh did not bequeath his share to Ratan Singh The plaintiff is therefore not entitled to the half of two thirds, but to one fourth of two thirds The issue of mesne profits has been inadvertently left out The plaintiff is entitled to the mesne profits of the share decreed to him for three years immediately before the institution of the suit, the amount of it will be determined by the court executing the

He did not, however, ...

other amount. The Subordinate Judge found that nothing ... due to the plaintiffs, but that Rs. 487 were due to the defenda... and dismissed the suit. The plaintiffs appealed, and the def... dant also filed cross objections under section 561, Civil Proced... Code, in which he stated "that the lower court should have pas...

* Second Appeal No 179 of 1909, from a decree of Louis Stuart, Dist... Judge of Meerut, dated the 21st of December, 1908, confirming a decree of S... Raghubans Lal, Subordinate Judge of Meerut, dated the 24th of September, 19...

was to induce that officer to give him part of the Bohra estate instead of Sherpur In the course of his order on that petition the Deputy Commissioner said that Gaya Din must take what had been sanctioned, for Sherpur had been given as a favour and not with reference to any pre existing title to the estate (plaintiffs' exhibit 7) This passage was considered by Mr Capper, Judicial Commissioner, in 1881, and has been considered by the court below in this case to show that the Government intended to confer Sherpur upon Gaya Din alone and not upon the family which he represented. But I am unable to take this view. In 1860 Ratan Singh was a child of about 9 years of age Umrao Singh was about 20 and Gaya Din was about 45, Ratan Singh cannot have had any hand in the concealment of arms, and as between Umrao and Gaya Din the latter would certainly have been held responsible for any infringement of the orders of Government The authorities cannot have intended by the confiscation of the estates and the restoration of a portion of them to punish Ratan Singh and Umrao Singh more severely than Gaya Din Singh There is nothing in the Chief Commissioner's letter which suggests an intention to confer Sherpur upon Gaya Din alone and not upon the family which he represented The remarks of the Deputy Commissioner in plaintiffs' exhibit 7 do not affect the question. He had no power to alter the terms of the "restoration" approved by the Chief Commissioner I have no doubt that the Chief Commissioner meant, as he says, to 'restore' one third of the estates to Gaya Din and not to make him a present at the expense of his brothers who had committed no fault The evidence also shows that Sherpur was considered by Gaya Din to be the property of the family after the restoration just as it had been before

"Gaya Din when examined in December 1859, (i e, after the general and before the special confiscation) said that he and his two brothers had equal shares in the estate and in September 1860, after the restoration of the Sherpur estate, he said:—'we are three brothers having equal shares' At the end of that statement he said that he had been appointed lambardar and made all arrangements, and that his two brothers were joint in mess with him but had nothing to do with anything else The last passage is relied upon by the plaintiffs as showing that Gaya Din claimed to be sole proprietor of the property, but I do not think that the words have necessarily any such meaning It must be remembered that Ratan Singh was in 1860 a mere child and Umrao Singh quite a young man The former certainly could not have interfered, and the latter probably did not interfere, with Gaya Din's management of the property, so that Gaya Din's statement probably meant no more than that all arrangements regarding the property were in his hands

"Next the names of all three brothers were entered in the khewat of 1860-1861 (see exhibit A2) Finally there is a mass of evidence that the three brothers lived in union in Khurd till about 1865 when Umrao Singh quarrelled with Gaya Din, removed to Rudarpur and soon afterwards laid a claim to separate possession of one third of the property I would, therefore, hold that the Sherpur estate was the joint property of the three brothers at least up to the time when Umrao Singh quarrelled with Gaya Din,

and no dissent is expressed to the first mentioned ruling. In the present case in our opinion there was no question whatever of proprietary title raised between the parties. The only question raised was the question of the effect and nature of the private arrangement which had been come to between the parties; and which, in truth and in fact related only to the mode of partition. This was a matter entirely for the Revenue Court. We allow the appeal and set aside the decree of the learned District Judge The appellant will have his costs in all courts.

*Appeal decreed.*

---

*Before Mr Justice Richards and Mr Justice Tudball.*

PARMANAND AND ANOTHER (PLAINTIFFS) *v* JAGAT NARAIN (DEFENDANT).*

*Civil Procedure Code (1882), sections 215A and 216—Principal and agent—Suit for rendition of accounts and payment of sum found due to principal—Defence that per contra money was due to agent—Court competent to grant a decree to agent.*

In a suit brought by the principals against an agent for rendition of accounts the agent expressed himself ready and willing to render accounts, but alleged that on such accounts being taken money would be found to be due to him; he did not, however, specifically pray for a decree for the sum alleged to be due to him. The Court granted a decree to the agent upon the finding that money was in fact due to him. *Held* that the decree was justified with reference to the provisions of sections 215A and 216 of the Code of Civil Procedure, 1882.

THE facts of this case were as follows:—

The plaintiffs brought the suit against their agent for rendition of accounts and for recovery of such amount as might be found to be due by him. The defendant, in his written statement, admitted the agency, signified his willingness to render accounts, and stated that on the accounts being taken it would be found that a sum of Rs. 2,056 was due to him from the plaintiffs. He did not, however, *specifically pray for a decree for that or any* other amount. The Subordinate Judge found that nothing was due to the plaintiffs, but that Rs. 487 were due to the defendant, and dismissed the suit. The plaintiffs appealed, and the defendant also filed cross objections under section 561, Civil Proced Code, in which he stated "that the lower court should have p

---

* Second Appeal No. 179 of 1909, from a decree of Louis Stuart, Judge of Meerut, dated the 21st of December, 1908, confirming a Raghubans Lal, Subordinate Judge of Meerut, dated the 24th of Septem

Ratan Singh, dated December 20th, 1870. These documents show that it was arranged between Lochan Kuar and Ratan Singh that the former should remain in possession for life of two-thirds of the estate, and that Lochan Kuar made a will in favour of Ratan Singh. In the will she said that in devising the property to Ratan Singh she was carrying out the wishes of her husband, thereby suggesting that Gaya Din had been the sole owner of the two thirds but at the same time she referred to the share of Ratan Singh as being one third, and to the share of Gaya Din as being one third, and this passage has been relied upon by the plaintiffs as showing that Gaya Din and Ratan Singh were not joint in estate.

"But I do not think that the passage should be pressed so far. Gaya Din and Ratan Singh were each entitled to an undivided one third share if the estate was joint, and the passage does not necessarily imply more than this. There is a mass of evidence that some sort of arrangement was made between Gaya Din and Ratan Singh when the latter withdrew his claim to a share. Gaya Din seems to have suggested that he alone was entitled to the estate and to have promised that he would make a will in Ratan Singh's favour or instruct his widow to do so. The widow also seems to have adopted the same attitude after her husband's death; while on the other hand Ratan Singh reasserted his right to a one-third share. In the result, as already stated, there was a compromise.

"The plaintiffs have relied strongly upon the fact that Ratan Singh claimed a one third share on the death of Gaya Din and recognized the right of Lochan Kuar to a one third share after 1871 (see Exhibit A5) as showing that there must have been a separation of interest between Gaya Din and Ratan Singh. They also relied on Ratan Singh's plaint in his suit against Lochan Kuar in 1881, when he claimed only a one third share. The plaint is not on the record, but the judgement in the suit is and it shows that he claimed only a one third share.

"In my opinion it is clearly proved that Ratan Singh was joint with Gaya Din till the latter's death, and I do not think that we should press too far the statement of Ratan Singh that he was entitled to a one third share or the fact that he never claimed more than a one third share. He was a young man of about 18 at the death of Gaya Din and may not have understood what his position really was. Moreover, there is no evidence of any real partition between the brothers, although it is admitted that Umrao Singh left the family house and went to Rudarpur. Umrao Singh obtained by his decree a one third share in the Sherpur estate, but there must have been other property liable to partition and there is no evidence that such property was ever divided.

"It appears to me to be clear that Ratan Singh remained joint with Gaya Din till the latter's death and then became entitled to two-thirds of the property. In my opinion the plaintiffs have altogether failed to prove that Gaya Din died entitled to either two-thirds or one-third of the Sherpur estate as separate property, and I hold, therefore, the suit should have been dismissed."

On this appeal—

*DeGruyther, K.C.*, and *Kenworthy Brown* for the appellants contended that the estate granted to Gaya Din Singh by the Government was his separate self acquired property. The property was granted to him "by way of favour and award, and

the present appeal is that the defendant not having claimed a set off against the plaintiffs' claim no decree could be passed in his favour for any money due to him from the plaintiff on the taking of accounts. In our opinion this plea is not well founded. It is true that the plaintiffs in their plaint claimed that a decree might be granted for whatever might be found due on the taking of accounts, nevertheless the plaintiffs' suit was in truth and in fact a suit for accounts against an agent. In our opinion such a suit necessarily involves an undertaking by the plaintiff to pay to the defendant any sum that may be found due to the defendant by him on the taking of accounts, and it is unnecessary that the defendant should plead a set off or counter claim. We think that the decree of the court below was quite justified by the provisions of sections 215A and 216 of Act XIV of 1882, which was in force at the time of making the decree. In the written statement the defendant expressly stated that on taking of accounts a certain sum would be found due to him. The appellants rely on the ruling in the case of *Nan Karay Phaw* v. *Ko Htaw Ah* (1). In our opinion this ruling does not apply. There the defendant denied the partnership and had made an independent claim against the plaintiff. We dismiss the appeal with costs.

*Appeal dismissed.*

(1) (1885) I. L. R. 13 Calc. 124.

entitled to a moiety of Gaya Din Singh's interest in the property in dispute by survivorship, even if the lands constituted joint family property, or in any case the appellants were entitled to the relief granted them by the Subordinate Judge, and the suit should not have been wholly dismissed

Sir *R Finlay, K C*, and *Ross* for the respondent contended as to the nature of the grant to Gaya Din Singh that the presumption was that a grant to one member of a joint family was for the benefit of the family It was not the intention of the Government to punish innocent persons, as would have been the case if the grant had not been meant for the joint family They considered the grantee a trustee for the other members of the family Reference was made to *Hur Purshad* v *Sheo Dyal* (1) As to Gaya Din Singh and Ratan Singh remaining joint after Umrao Singh went away, it was a question of fact and the two courts below had concurrently held that they remained joint up to the death of Gaya Din Singh The appellate court had rightly held that the property in suit was not the property of Gaya Din alone, but of the family represented by him The effect of Umrao Singh separating himself was no to constitute the other members separate Reference was made to Mayne's Hindu Law, 7th edition, page 495, paragraphs 671, 672, and the cases cited for the appellants to that effect, and as to effecting partition by agreement or by declaratory decree were distinguished There was in the present case no intention of separating shown [Mr AMEER ALI referred to the case of *Sudaburt Pershad Sahoo* v *Lotf Ali Khan* (2) as to whether a mere signification of intention was sufficient, and Sir ARTHUR WILSON referred to *Radha Churn Dass* v *Kirpa Sindhu Dass* (3) as showing that where a disruption of unity has occurred there was no presumption as to any other particular member being joint or separate ] There must be some unequivocal act or declaration on the part of the family of intention to separate *Debee Pershad* v *Phool Koeree* (4) The appellants had failed to prove that Gaya Din Singh died entitled to either two-thirds or one third of the property in suit as separate property The respondent having remained joint with Gaya Din Singh

(1) (1876) L. R 3 I A 259 (269)

(2) (1870) 14 W R, C R, 339

(3) (1879) I. L. R. 5 Calc 474 (476)

(4) (1869) 3 B L R 385, Note; 12 W R, 510

property, and a grant of it was either issued or in immediate contemplation, when it was discovered that Gaya Din was in possession of a quantity of concealed arms. The property was again confiscated, and Gaya Din was put in prison. Then Gaya Din or his servants made disclosure of similar offences committed by other landholders, and so induced the Government to look favourably on his case. Ultimately the Government made him a grant of Sherpur, which in value was about equal to one-third of the whole family property.

The question is:—Was Sherpur the self-acquired property of Gaya Din, or was it the joint property of the three brothers?

Now Gaya Din himself, when examined with a view to the preparation of the khewat of ilaqa Sherpur, stated that he and his two brothers were "joint in equal shares," and the khewat, which is signed by Gaya Din, Umrao and Ratan (Umrao's) signature being affixed by Ratan), and countersigned by the presiding officer on the 24th September, 1860, gives under the head "Shares of proprietors," and "Names of zamindars," "Gaya Din, Umrao Singh, and Ratan Singh, sons of Bakht Singh, all three in equal shares." Gaya Din never disputed the right and title of his two brothers to a joint share in the property. It would seem therefore, that it must be inferred that under a family arrangement, which cannot now be questioned, the three brothers became jointly entitled as members of an undivided Hindu family to the Sherpur estate, although the Government grant was to Gaya Din alone.

The three brothers continued to live joint until a year or a year and a half before Gaya Din's death, which occurred in January, 1869. In 1867 Umrao quarrelled with Gaya Din, left the family home, and brought a suit for partition. Ratan, too, brought a suit for partition, claiming one-third; but he remained with Gaya Din and withdrew his claim. Umrao, on the other hand, continued his suit, making Gaya Din's widow a defendant, and there was a decree by consent, giving Umrao one-third of the estate. Ratan made an arrangement with the widow, who had executed a will in his favour, that she was to remain in possession, and that his rights were to be in abeyance during her life. Effect was given to this agreement when Ratan afterwards

VOL. XXXII ] [PART XI



# THE INDIAN LAW REPORTS.

## NOVEMBER 1910.

(Pages 527—598.)

## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council ... J. V. WOODMAN, *Middle Temple.*
High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*



ALLAHABAD:

PRINTED BY F. LUKER, SUPERINTENDENT, GOVERNMENT PRESS, AND PUBLISHED AT THE GOVERNMENT BOOK DEPOT, UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

Price, Re. 1.

*Per* TUDBALL, J.—The presumption mentioned in clause 3, section 201 of the Agra Tenancy Act, is one which is rebuttable only in a Civil Court and not in a Revenue Court.

THE facts of this case were as follows:—

The plaintiff brought a suit for profits under section 164 of the Agra Tenancy Act, 1901, against the defendant, who was a lambardar. His suit was resisted on the ground that he had no proprietary title. The plaintiff had not alleged in his plaint that his name appeared as a recorded co-sharer. The suit was dismissed by the Assistant Collector on the ground that the plaintiff had no title.

The judgement was affirmed by the District Judge on appeal. The plaintiff thereupon appealed to the High Court. The case came before KARAMAT HUSAIN, J., who referred to the lower appellate court the issue:—"Was the plaintiff a recorded co-sharer in 1311, 1312 and 1313 Fasli?" On return of the finding the following judgement was delivered:—

"This was a suit for a share of profits against a lambardar. The court of first instance dismissed the claim and the decree of that court was confirmed by the lower appellate court on the ground that the plaintiff when he brought this suit was not, in consequence of a judgement in the case of *Musammat Munna* v. *Parsotam Narain*, a co-sharer at all during the period to which the suit related, but was a trespasser. The plaintiff preferred a second appeal to this Court, and urged that the lambardar was liable to pay to the plaintiff who was a co-sharer. As there was no finding that the plaintiff was a recorded co-sharer in 1311, 1312 and 1313 Fasli, I by my order, dated the 5th of May, 1909, remitted an issue to the lower appellate court for trial. The finding of the lower appellate court is that his name stood as a co-sharer in the years 1311, 1312 and 1313 Fasli. But the lower appellate court goes beyond recording this finding and adds that 'this case is concluded by the Full Bench ruling in *Bhawani Singh* v. *Dilawar Khan* (1), in which it has been held that the Revenue Court was not competent to ignore the decree of the Civil Court and that the decree of the Civil Court being in favour of the defendant, the plaintiff could not rely upon the khewat as it stood. In view of this authority the respondent has not produced any proof to rebut the documentary evidence filed by the appellant.' The learned District Judge is in error in thinking that the Full Bench ruling in *Bhawani Singh* v. *Dilawar Khan* (1) applies to this case. In the Full Bench case there was a decree *inter partes* as will appear from the following remarks:—'In my opinion, whichever of these two interpretations be put upon clause (3) of section 201, matters little so far as this appeal is concerned. Before the Assistant Collector made his reference to the District Judge on the 24th of March 1909, he had before him in court

(1) (1909) I. L. R., 31 All., 253.

v. *Syed Muhammad Baqar* (1), and *Bhawani Sing* v *Dilawhar Khan* (2)

Munshi *Gulzari Lal*, for the respondent, submitted that under the Tenancy Act, unless there was a special provision, the Revenue Courts had no power to decide questions of proprietary title Section 199 and clauses (1) and (2) of section 201 contemplated cases where a Revenue Court could constitute itself into a Civil Court and decide questions of title, and its decision had the effect of a Civil Court decree, *Beni Pande* v *Raja Kausal Kishore Prasad Mal Bahadur* (3) No such provision was made under clause (3) of section 201, authorizing the Revenue Court to decide a question of title The reason was that the Court had to assume for the purposes of cases for profits that the plaintiff was the owner of the share recorded in his name The *proviso* clearly showed that it was the defendant and not the plaintiff who had to go to the Civil Court If it were meant to raise a rebuttable presumption only, sections 44 and 45 of the Land Revenue Act and clause (3) of section 201 of the Tenancy Act would be quite superfluous The words 'shall presume' had never been used by the Legislature unless accompanied by other words making it clear whether the presumption was or was not rebuttable The only exception was in the case of the Indian Evidence Act where the words had been given a special meaning That Act was not *in pari materia* with the Tenancy Act, and definitions of one Act were not to be read into another, *Pandah Gazi* v *Jennuddi* (4) Wherever the Legislature meant to create a rebuttable presumption it always took care to add 'until the contrary was proved' or something else to that effect He referred to section 35 of Act II of 1901, the provisions of the Bengal Tenancy Act, and the Negotiable Instruments Act, section 118 The word 'conclusive' could not be used in section 201, as the decision of the Revenue Court based on entries in *Khewats* was not conclusive between the parties Interpreting the section as creating an irrebuttable presumption could not work any particular hardship As it was no

(1) (1903) I. L. R 30 All 431 foot no e
(2) (1909) I. L R. 31 All 253
(3) (1903) I L. R. 29 All 160
(4) (1978) I. L. R. 4 Calc 665

the appellant amounts simply to this, that clause (3) of section 201, merely shifts the burden of proof on to the shoulders of the defendant in a suit for profits, when he contends that the plaintiff has no title, provided the latter proves that he is the recorded owner of the share On the other hand the contention for the respondent is that in cases where the plaintiff is the recorded owner of the share which he claims, the Revenue Court cannot go behind that record, but for the purposes of the suit must hold that he has title, leaving it to the defendant or some other interested party to go to the Civil Court to establish the fact that the plaintiff has not such title

On the point before us there has been a conflict of decisions in this Court In *Dil Kunwar* v *Udai Ram* (1) KNOX J held that the Revenue Court was entitled to go behind the entry in the records of rights

In *Dhanla* v *Umrao Singh* (2) KNOX J adhered to this view, but his learned colleague RICHARDS J differed from him On Letters Patent appeal the view of KNOX J was approved by the learned Chief Justice and Mr Justice Sir WILLIAM BURKITT (*vide* I L R, 30 All, 58)

We have been referred on behalf of the appellant to the decisions reported in I L R, 27 All, 436 and I L R, 29 All, 158 as opinions more or less in favour of his contention, but in my opinion they are not of any assistance in the matter The opposite view was taken by Mr Justice KARAMAT HUSAIN in *Har Prasad* v *Syed Muhammad Baqar*, Second Appeal No 152 of 1907, and by BANERJI and RICHARDS, JJ, in *Bechan Singh* v *Karan Singh* (3) and in *Niaz Ali Khan* v *Govind Ram* (4) and again by RICHARDS and ALSTON, JJ, in *Meharban Singh* v *Umrao Singh*, Second Appeal No 703 of 1908, decided on the 2nd of August, 1909 The question for decision, to my mind, is what was the intention of the Legislature as expressed by the language of the *whole* of clause (3) of section 201? I lay emphasis on the word *whole* because the learned pleader for the appellant took the two words "shall presume," entirely out of their context and argued as to their meaning, contending that

(1) (190 ) I L R 23 All 148
(2) Weekly Notes 1907 p 43
(3) (1903) I L R 30 All 447
(4) (1905) I L R 30 All 450 [illegible]

BOOKS AND PUBLICATIONS FOR SALE

BY THE

# SUPERINTENDENT OF GOVERNMENT PRINTING INDIA.

8 HASTINGS STREET CALCUTTA

*All books published by the Superintendent of Government Printing India can be purchased either [dir]ectly or through the following or any other booksellers —*

AGENTS

CALCUTTA.—*Thacker Spink & Co* | BOMBAY—{ *Thacker & Co Ld*
MADRAS —*Higginbotham & C* | { *Radhabai Atmaram Sagoon*

NOTICE —*Books required for private use only can be purchased Application should be [acc]ompanied by a rem ttan e unless it is wished that the books sh uld be sent by value payable post [in] which case besides the ordinary postage an add tional charge will be made for registration and [com]mission*

*Books required for the Publ Service should be obtained through Local Governments*

---

*The amounts within parentheses are for packing and postage*

---

## List of Books and Publications for sale which are less than two years old

---

## LEGISLATIVE DEPARTMENT.

---

[T]hese publications may b obta ned from the Office of the Superintendent of Gov rnment Pr nt ng Ind a No 8 Hast ngs Street Calcutta ]

[T]HE PRICES OF THE GENERAL ACTS LOCAL CODES MERCHANT SHIPPING DIGEST INDEX TO ENACTMENTS AND THE DIGESTS OF INDIAN LAW CASES 1901 TO 1907 (SEPARATELY AND PER SET OF FIVE VOLUMES) HAVE BEEN CONSIDERABLY REDUCED

THE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPARTMENT

---

### I —THE INDIAN STATUTE BOOK.

REVISED EDITION

*Super royal 8vo cloth lettered*

#### B —GENERAL ACTS

General Acts of the Governor General of Ind a in Counc l Vol I from 1834 to 1867 Ed tion 1909 — Rs 6 (10 *a*)

General Acts of the Governor General in Counc l Vol II from 18 8 to 1878, Ed tion 1909 — Rs 7 (10 *a*)

General Acts of the Governor General in Counc l Vol III from 1879 to 1886 Edition 1909 — Rs 6 ( *a*)

General Acts of the Governor General in Co inc l Vol IV, from 1887 to 1897 Edition 1909 — Rs 6 (9 *a*)

General Acts of the Governor General in Counc l Vol V f om 1898 to 1903 Edition 1909 — Rs 6 ( *a*

General Acts of the Governor General in Council Vol VI from 1904 to 1909 Edition 1909 — Rs 7 (12 *a*)

#### C —LOCAL CODES

The Bengal Code Third Ed tion 1905 contain ng the Reg lat ons and Local Acts in force in Bengal Vols I to V Rs 6 a vol me or Rs 30 Reduced to Rs 20 for set of 5 Vols

having such proprietary right, the Legislature has not deemed it necessary *or fit to give the* Revenue Court *the power to proceed mutatis mutandis* as directed in section 199 On the contrary, it has enacted clause (3) of section 201, wherein it has laid down that if the plaintiff is recorded as having such proprietary right the Court shall presume that he has it, but nothing in this sub section shall affect the right of *any person* to establish by suit in the Civil Court that the *plaintiff* has not such proprietary right The plain meaning of this sub section (3) seems to my mind to be that the Revenue Court itself shall not go into the question of title, that it shall take it for granted for the purposes of the suit before it that the plaintiff has title, leaving it to any person interested in disputing that title to go to the *Civil Court* and establish the contrary This provision in clause (3) is obviously in contradistinction to clauses (1) and (2) of the section In the latter, where the plaintiff is not recorded, the Revenue Court may go behind the record into the question of title and pass a decision which is final and binding on the parties If the law allowed it the same court would be equally capable of deciding finally the question of title where the plaintiff's name is recorded in the khewat The mere entry of the name in the khewat does not injuriously affect the intelligence and legal knowledge of an Assistant Collector, and it is difficult to understand why, if the Legislature intended that the Revenue Court *should be able to* go behind the entry in this case, it should *not* allow it to pass an equally final and binding decision It obviously had some reason for not giving the Revenue Court's decision the finality which is secured by clause (1) of the section, and *that* reason was clearly that it did not intend the Court to go behind the record in the khewat, leaving the question of the title to be decided by a separate suit in the Civil Court The suit contemplated in the *proviso* to clause (3) is one to be brought *against the plaintiff* If the Revenue Court could go behind the khewat in the case contemplated in this clause, its decision could not be final and binding on either party, because the Legislature has not empowered it to pass such a decision, on the contrary it has enacted the *proviso* to clause (3) allowing a civil suit to be brought against the plaintiff It seems to me absurd that the same

| | |
|---|---|
| Act V of 1869 (Ind an Art cles of War) as mod fied up to 1st January 1909 | Rs 1 2 0 (3 a) |
| Act V of 18 0 (Unclaimed Depos ts) as mod fied up to 1st October 1908 | 1 a (1 a) |
| Act VII of 1870 (Court Fees) as mod fied up to 1st February 1909 | Rs 1 2-0 (2 a) |
| Act XXIII of 1871 (Pens ons) as modified up to 1st S ptember 1909 | 2 a 8 p (1 a) |
| Act XXVII of 18 1 (Cr m nal Tr bes) as mod fied up to 1st October 1908 | 5 a 6 p (1 a 6 p) |
| Act I of 18 2 (Evidence) as mod fied up to 1st May 1908 | Re 1 (2 a) |
| Act IX of 1872 (Contract) as modified up to 1st February 1908 | Re 1 4 a (2 a) |
| Act IX of 1874 (European Vagrancy) as modified up to 1st September 1909 | 6 a 6 p (1 a) |
| Act I of 1878 (Op um) as modified up to 1st October 1907 | 5 a 6 p (1 a) |
| Act VI of 1878 (Treasure Trove) as mod fied by Act XII of 1891 as reprinted on the 14th February 1908 | 2 a 9 p (1 a) |
| Act VIII of 1878 (Sea Customs) as modified up to 1st June 1908 | Re 1 5-3 (4 a) |
| Act XI of 1878 (Arms) as modified up to 1st March 1910 | 6 a (1 a) |
| Act XVI of 1879 (Transport of Salt) as modified up to 1st October 1907 | 1 a 6 p (1 a) |
| Act XIII of 1880 (Vaccinat on) as modified up to 1st September 1909 | 4 a 9 p (1 a) |
| Ac XV of 1881 (Factories) as mod fied up to 1st Apr l 1910 .. | 5 a 6 p (1 a 6 p) |
| Act XVIII of 1881 (Central Provinces Land revenue) as mod fied up to 1st March 1909 | Rs 1 2 0 (3 a) |
| Act XXVI of 1881 (Negot able Instruments) as mod fied up to 1st September 1909 | 10 a (1 a) |
| Act II of 1882 (Indian Trus s) as mod fied up to 1st June 1909 | 10 a (1 a) |
| Act XII of 1882 (Salt) as modified up to 1st August 1909 | 7 a (2 a) |
| Act V of 1883 (Ind an Merch ant Sh pping) as mod fied up to 1st September 1909 | 6 a (1 a) |
| Act IV of 1884 (Explosives) as modified up to 1st September 1908 | 4 a (9 p) (1 a) |
| Act IX of 1884 (Legal Practitioners) as modified up to 30th June 1909 | 1 a 6 p (1 a) |
| Act III of 1888 (Police) as modified up to 1st January 1 09 | 1 a 9 p (1 a) |
| Act II of 1889 (Measures of Length) with footnotes | 1 a 3 p (1 a) |
| Act IV of 1889 (Indian Merchandise Marks) as modified up to 1st August, 1908 | 6 a (1 a) |
| Act VI of 1889 (Probate and Administrat on) as mod fied up to 1st January 1909 | 2 a 9 p (1 a) |
| Act VI of 1890 (Charitable Endowments) as mod fied up to 1st August 1908 | 2 a 6 p (1 a) |
| Act IX of 1890 (Indian Railways) as mod fied up to 1st June 1909 | Re 1 2 0 (2 a) |
| Act XI of 1890 (Prevention of Cruelty to Animals) w th foot notes | 2 a (1 a) |
| Act XIII of 1890 (Excise Malt Liquors) as mod fied up to 1st October 1908 | 1 a 6 p (1 a) |
| Act X of 1891 (Ind an Penal Code Amendment) as mod fied up to 1st August 1909 .. | 1 a (1 a) |
| Act XII of 1895 (Indian Companies Memorandum of Association) as modified up to 1st August 1909 .. | 2 a (1 a) |
| Act III of 1898 (Lepers) as modified up to 1st September, 1909 .. | 4 a (1 a) |
| Act V of 1898 (Code of Criminal Procedure) as mod fied up to 1st August 1909 | Rs 3 10 a (8 a) |
| Act VIII of 1899 (Petroleum) as mod fied up to 1st January 1909 | 7 a (1 a) |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 .. | 2 a. 6 p (1 a) |

that in section 201(3) these words were not added, but that a proviso was added, showing that the defendant or any interested party could go to the Civil Court and rebut the presumption ordered by the clause to be made in favour of the plaintiff. One cannot also lose sight of the fact that the Evidence Act and the Tenancy and Revenue Acts were passed by two distinct and separate legislative bodies. No doubt in section 9 of the Tenancy Act it has laid down that certain entries as to permanent and fixed rate tenures are conclusive proof, but these entries are conclusive proof for *all* courts and not for Revenue Courts alone.

Furthermore, if to the words "shall presume" must be added the words "until the contrary is proved" the whole of clause (3) is mere surplusage, for that presumption already exists by reason of sections 44 and 57 of the Revenue Act, III of 1901. The wording of the *proviso* shows that the Legislature contemplated the defendant or some other interested party, other than the plaintiff, going to the Civil Court to establish that the plaintiff has not the right. It clearly did not contemplate the plaintiff going to that court to upset the Revenue Court's decision. But if the Court can go into the question and either party can subsequently go to the Civil Court to litigate the matter there afresh, it surely was absurd to inform only the defendant and persons other than the plaintiff that they might resort to that court. The *proviso* would surely have enabled *all* parties to go to the Civil Court. Granting that "shall presume" ordinarily has the meaning ascribed to it in the Evidence Act, the context, the scope, and the policy of the Act show clearly to me that in the present case they are qualified by the proviso.

As to the dire calamities which have been held up as the probable and possible results of holding that the Revenue Court is bound by the khewat, all that it is necessary to say is that we are not concerned with them. They are matters for the consideration of the Legislature. We are concerned only with the intention of the latter as shown by the plain language of the section, and, reading clause (3) of section 201 as a whole, there is no doubt in my mind that the intention was that the Revenue Court should not go behind the entry in the khewat.

| | |
|---|---|
| Act VI of 1890 (Charitable Endowments) as modified up to 1st August 1908 ... | In Urdu 6 *p* (1 *a*) |
| Ditto ditto | In Nagri 9 *p* (1 *a*) |
| Act XII of 1896 (Excise) as modified up to 1st March 1907 | In Urdu 2 *a* 9 *p* (2 *a*) |
| Ditto ditto | In Nagri 3 *a* 3 *p* (2 *a*) |
| Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 ... | In Urdu 9 *p* (1 *a*) |
| Ditto ditto | In Nagri 9 *p* (1 *a*) |
| Act I of 1906 [Indian Tariff (Amendment)] ... | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (1 *a*) |
| *Act III of 1906 (Coinage)* ... | *In Urdu 9 p (1 a)* |
| Ditto ditto | In Nagri 9 *p* (1 *a*) |
| Act V of 1906 (Stamp Amendment) | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (1 *a*) |
| Act III of 1907 (Provincial Insolvency) | In Urdu 1 *a* 6 *p* (1 *a*) |
| Ditto | In Nagri 1 *a* 6 *p* (1 *a*) |
| Act IV of 1907 [Repealing and Amending (Rates and Cesses)] | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p*. (1 *a*) |
| Act V of 1907 (Local Authorities Loan) | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (1 *a*) |
| Act VI of 1907 (Prevention of Seditious Meetings) | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (1 *a*) |
| Act I of 1908 (Legal Practitioners) ... | In Urdu 3 *p* (1 *a*) |
| Ditto ditto ... | In Nagri 3 *p* (1 *a*) |
| Act II of 1908 (Tariff) | In Urdu 3 *p* (1 *a*) |
| Ditto | In Nagri 3 *p* (1 *a*) |
| Act III of 1908 [Indian Trusts Amendment] | In Urdu 3 *p* (1 *a*) |
| Act V of 1908 (Code of Civil Procedure) | In Urdu Rs 1 2 (6 *a*) |
| Ditto ditto ... | In Nagri Rs 1 2 (6 *a*) |
| Act VI of 1908 (Explosive Substances) ... | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (1 *a*) |
| Act VII of 1908 (Incitements to Offences) | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (1 *a*) |
| Act IX of 1908 (Limitation) | In Urdu 2 *a* (1 *a*) |
| Ditto ditto | In Nagri 2 *a* (1 *a*) |
| Act X of 1908 (Salt Duties) | In Urdu 3 *p* (1 *a*) |
| Ditto | In Nagri 3 *p* (1 *a*) |
| Act XI of 1908 (Assam Labour and Emigration) | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (2 *a*) |
| Act XIV of 1908 [Indian Criminal Law (Amendment)] | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (1 *a*) |
| Act XVI of 1908 (Indian Registration) | In Urdu 2 *a* (2 *a*) |
| Ditto ditto | In Nagri 2 *a* (2 *a*) |
| Act XVII of 1908 (Indian Emigration) | In Urdu 2 *a* 3 *p* (2 *a*) |
| Ditto ditto | In Nagri 2 *a* 3 *p* (2 *a*) |
| [Act I of 1909 (Indian Steamship Law Amendment)] | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (1 *a*) |
| Act IV of 1909 (Whipping) | In Urdu 3 *p* (1 *a*) |
| Ditto | In Nagri 3 *p* (1 *a*) |
| Act V of 1909 [Amending (Army Act)] | In Urdu 3 *p* (1 *a*) |
| Ditto ditto ... | In Nagri 3 *p* (1 *a*) |
| Act VII of 1909 (Anand Marriage) | In Urdu 3 *p* (1 *a*) |
| Ditto ditto | In Nagri 3 *p* (1 *a*) |

*Banwari Lal* v *Nandar* (1), and moreover in that case the learned judges do not express any opinion as to the court in which the presumption may be rebutted The decision therein is clearly not an opinion in favour of the opposite view

I regret having to differ from my learned colleagues, but it seems to me clear that the presumption mentioned in the clause (3) of section 201 is one which is *rebuttable only in a Civil Court and not in a Revenue Court* I would therefore dismiss the appeal

STANLEY, C J —I am unable to agree in the judgement which has just been pronounced The suit was one for a share of profits under section 164 of the Agra Tenancy Act The defendant traversed the title of the plaintiff and an issue was framed upon this plea The Assistant Collector came to the conclusion upon the evidence that the plaintiff had no title and therefore dismissed his suit Upon appeal the learned District Judge confirmed the decision of the Assistant Collector, finding that the plaintiff had no title to the property in respect of which he claimed a share of the profits

A second appeal was preferred, and the claim was decreed on the ground that the Revenue Court had no power to go into the merits of the case, but was bound to accept the fact that the plaintiff was a recorded sharer as conclusive proof establishing his title

This appeal under the Letters Patent was then preferred, and owing to the difference of opinion amongst the Judges as to the true meaning of section 201 of the Agra Tenancy Act a Full Bench was nominated by me to try the appeal

The question has assumed importance only from the fact that there are conflicting decisions of the High Court upon it It is a matter, as it appears to me, of no great importance whether or not the presumption in the section is deemed to be a conclusive and irrebuttable presumption

Section 164 gives the right of suit to a co sharer, and section 201 provides the procedure which the Revenue Court is to adopt in dealing with suits under chapter XI (in which chapter section 164 falls) Section 201 divides the plaintiffs claiming a

(1) (190*) I L R, 29 All, 158

# List of Books and Publications for sale which are more than two years old.

## LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No 8 Hastings Street, Calcutta

THE PRICES OF THE GENERAL ACTS LOCAL CODES, MERCHANT SHIPPING DIGEST AND INDEX TO ENACTMENTS HAVE BEEN CONSIDERABLY REDUCED.

### I.—THE INDIAN STATUTE-BOOK.

REVISED EDITION

*Super royal 8vo cloth lettered*

#### A.—STATUTES

| | |
|---|---|
| A Collection of Statutes relating to India, Volume I, containing the Statutes up to the end of 1890 Edition 1899 | Rs. 6. (10 *a*) |
| A Collection of Statutes relating to India Volume II containing the Statutes from 1891 to 1898 Edition 1900 | Rs 8 (10 *a*) |

#### C LOCAL CODES

| | |
|---|---|
| The Ajmer Code, Third Edition, 1905 containing the enactments in force in Ajmer Merwara with an Appendix consisting of a list of the enactments which have been declared in force in or extended to, Ajmer Merwara by notification under the Scheduled Districts Act, 1874, with a Chronological Table and an Index | Rs 2-8 (7 *a*) |
| The Baluchistan Code, Edition 1900, containing the local enactments in force in British Baluchistan and the Agency territories with Chronological Tables and an Index | Rs. 5 (10 *a*.) |
| The Burma Code Edition 1899 | Rs 5. (9 *a*) |
| The Central Provinces Code, Third Edition 1904 consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the Central Provinces with an Appendix containing a list of the Acts which have been applied to the Scheduled Districts of the Central Provinces by notification under the Scheduled Districts Act, 1874, and an Index | Rs 4 (6 *a*) |
| The Madras Code, Vols I and II Edition 1902 Rs 12 Reduced to Rs 8 ... | (Re 1) |
| The Punjab and North-West Code, Edition 1903, consisting of the unrepealed enactments locally in force in the Punjab and the North West Frontier Province, with appendix and an Index | Rs 6 (10 *a*) |

### II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION.

| | |
|---|---|
| Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1898 (with foot-notes brought down to 1st December 1901) | 7 *a* (1 *a*) |
| Act XX of 1847 (Copyright), as modified up to 1st December 1903 | 5 *a* (1 *a*) |
| Act XVIII of 1850 (Judicial Officers' Protection) with footnotes | 1 *a* 9 *p* (1 *a*.) |
| Act XIX of 1850 (Apprentices), as modified up to 1st May 1905 | 3 *a* 6 *p* (1 *a*) |
| Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903 | 2 *a* 6 *p* (1 *a*) |
| Act VIII of 1851 (Tolls on Roads and Bridges), as modified up to 1st June, 1897 | |

the word "presume" by lawyers and text writers. Now, in the words of Lord Esher —"If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity" [*The Queen* v. *Judge of City of London Court*, 1892 1 Q. B., at page 290]. Lord Brougham on the same subject in *Crawford* v *Spooner* (1) thus observes —"We cannot fish out what possibly may have been the intention of the Legislature we cannot aid the Legislature's defective phrasing of the Statute; we cannot add, and mend, and by construction make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly, much more, if the Legislature intended something very different, if the Legislature intended something pretty nearly the opposite of what is said, it is not for Judges to invent something which they *do not meet* within the words of the text (aiding their construction of the text always, of course, by the context), it is not for them so *to supply* a meaning, for, in reality, it would be supplying it: *the true way* in these cases is, to take the words as the Legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble, or by the context of the words in question, controlled or altered, and, therefore, if any other meaning was intended than that which the words purport plainly to *import, then let* another Act supply that meaning and supply *the defect* in the previous Act"

We have then to see whether the natural construction of the words "shall presume" is by the context controlled or altered, and whether or not any other meaning is intended than that which the words purport clearly to import. The argument on behalf of the respondent is that the latter portion of the sub section in which these words appear so qualifies them as in effect to render necessary the interpolation of the word "conclusively," so that the sub section will run as follows — "If the plaintiff is recorded as having such proprietary right the court shall conclusively presume that he has it" The words following are as follows —' But nothing in this sub-section shall

(1) 1846) 4 Moo I. A., 179 (187)

Act XV of 1874 (Laws Local Extent) as modified up to 1st October 1895 — 7 a (1 a)

Act IX of 1875 (Indian Majority) as modified up to 1st May 1906 — 2 a (1 a)

Act XI of 1876 (Presidency Banks) as modified up to 1st March 1907 — 11 a (2 a)

Act I of 1877 (Specific Relief) as modified up to 1st February 1904 — 11 a (1 a 6 p)

Act VII of 1878 (Forests) as modified up to 1st December 1903 — 10 a (2 a)

Act XVII of 1878 (Ferries) as modified up to 1st June 1902 — 6 a (1 a 6 p)

Act XVII of 1879 (Dekkhan Agriculturists' Relief) as modified up to 1st June 1905 — 10 a (2 a)

Act XVIII of 1879 (Legal Practitioners) as modified up to 1st May 1896 — 7 a 6 p (1 a)

Act VII of 1880 (Merchant Shipping) as modified up to 15th October 1891 — 10 a (2 a)

Act V of 1881 (Probate and Administration), as modified up to 1st July 1890 — 12 a (2 a)

Act IV of 1882 (Transfer of Property) as modified up to 1st December 1905 — 15 a (2 a)

Act V of 1882 (Indian Easements) as amended by the Repealing and Amending Act 1891 (XII of 1891) — 8 a (1 a)

Act VI of 1882 (Companies) as modified up to 1st August 1906 — Re 1 10 (3 a)

Act XV of 1882 (Presidency Small Cause Court) as modified up to 1st June 1906 — 10 a (2 a)

Act VIII of 1883 (Little Cocos and Preparis Islands Laws) as modified up to 1st October 1902 — 1 a 3 p (1 a)

Act XIX of 1883 (Land Improvement Loans) as modified up to 1st September, 1906 — 2 a 6 p (1 a)

Act VI of 1884 (Inland Steam vessels) as modified up to 1st July 1891 — 9 a (2 a)

Act VII of 1884 (Steam ships) as modified up to 1st July 1890 — 6 a (1 a)

Act XII of 1884 (Agriculturists' Loans) as modified up to 1st February 1903 — 2 a (1 a)

Act XVIII of 1884 (Punjab Courts) as modified up to 1st December, 1899 — 7 a (1 a)

Act XIII of 1885 (Indian Telegraph) as modified up to 1st March, 1906 — 5 a (1 a)

Act II of 1886 (Income tax) as modified up to 1st April 1903 — 8 a (1 a 6 p)

Act VI of 1886 (Births Deaths and Marriages Registration) as modified up to 1st June 1891 — 6 a (1 a)

Act XI of 1886 (Tramways) as modified up to 1st December 1903 — 9 a (2 a)

Act XIII of 1886 (Securities), as amended by Act XII of 1891 — 2 a 9 p (1 a)

Act VII of 1887 (Suits Valuation) as modified up to 1st October, 1904 — 1 a 9 p (1 a)

Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1900 — 6 a (1 a)

Act XIV of 1887 (Indian Marine) as modified up to 15th February 1899 — 8 a (1 a.)

Act V of 1888 (Inventions and Designs), as modified up to 1st July 1903 — 9 a (2 a)

Act I of 1889 (Metal Tokens) as modified up to 1st April 1904 — 1 a 9 p (1 a)

Act VII of 1889 (Succession Certificates) as modified up to 1st December 1903 — 5 a 6 p (1 a)

Act XIII of 1889 (Cantonments) as modified up to 1st March 1895 — 7 a (1 a)

Act XV of 1889 (Official Secrets), as modified up to 1st April, 1904 — 8 a (1 a)

Act X of 1890 (Press and Registration of Books) as modified up to 1st December, 19 8 — 3 a 3 p (1 a)

right which he claims The sub section is merely in a paraphrased form a repetition of sections 44 and 57 of the Revenue Act, an Act which was passed at the same time as the Rent Act. Section 57 of that Act provides that "all entries in the record of rights prepared in accordance with the provisions of this chapter shall be presumed to be true until the contrary is proved . but no such entry . shall affect the right of any person to claim and establish in the Civil Court any interest in land which requires to be recorded in the registers prescribed by clauses (a) to (d) of section 32" The wording of this section is practically the same as that of section 44 Under the Revenue Act entries in the record of rights are *primâ facie* evidence, and it seems to me the Legislature in enacting sub section (3) of section 201 has accepted the presumption directed to be applied in the Revenue Act

But it is said that in view of the provisions, to which I have referred, of the Revenue Act, if this be the true construction of sub-section (3) of section 201 of the Rent Act, this last mentioned section is superfluous This argument seems to me to have no force The one Act deals with the law relating to land revenue, the other deals with the law relating to agricultural tenancies and other matters It was obviously desirable to provide for the presumption in question in section 201 so that the Act should be self contained and there should be no necessity to have recourse to the Revenue Act for the purpose of discovering the rule of presumption therein prescribed The language of the *proviso* in sections 44 and 57 of the Revenue Act is practically the same as that of the *proviso* to sub section (3) of section 201 of the Rent Act

It is further said that, unless the expression "shall presume" is interpreted as "shall irrebuttably or conclusively presume" and the suit is decided against the recorded proprietor, no appeal is given to him by the *proviso*, but I am unable to attach any weight to this, as the *proviso* patently was in my opinion only meant to apply to a case in which the plaintiff is successful in his suit by force of the presumption created in his favour If he is defeated in his suit, he has the right of appeal which is given by section 177. It will be observed too that the *proviso* does not

| | |
|---|---|
| Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1903 | In Urdu and Nagri 3 p each (1 a) |
| Act XV of 1856 (Hindu Widows Re-marriage) | In Urdu 6 p (1 a) |
| Ditto ditto | In Nagri 6 p (1 a) |
| Act XX of 1856 (Chaukidars) as modified up to 1st November 1903 | In Urdu 2 a 6 p (1 a) |
| Ditto ditto | In Nagri 2 a 6 p (1 a) |
| Act XXXIV of 1858 [Lunacy (Supreme Courts)] as modified up to 30th April 1903 | In Urdu 1 a (1 a) |
| Ditto ditto | In Nagri 1 a (1 a) |
| Act XXXV of 1858 [Lunacy (District Courts)] as modified up to 30th April 1903 | In Urdu 1 a (1 a) |
| Ditto ditto | In Nagri 1 a (1 a) |
| Act XXXVI of 1858 (Lunatic Asylums) as modified up to 31st May, 1903 | In Urdu 1 a 6 p (1 a) |
| Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874 | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December 1904 | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act XLV of 1860 (Penal Code) as modified up to 1st April 1903 | In Urdu Re 1 5 (5 a.) |
| Ditto ditto | In Nagri Re 1 5 (5 a) |
| Act V of 1861 (Police) as modified up to 7th March 1903 | In Urdu 2 a 9 p (1 a) |
| Ditto ditto | In Nagri 2 a 9 p (1 a) |
| Act XVI of 1861 (Stage carriages) as modified up to 1st February 1898 | In Urdu 1 a 3 p (1 a) |
| Ditto ditto | In Nagri 1 a 3 p (1 a) |
| Act III of 1864 (Foreigners) as modified up to 1st September 1906 | In Urdu 1 a (1 a) |
| Ditto ditto | In Nagri 1 a (1 a) |
| Act III of 1865 (Carriers) modified up to 31st May 1903 | In Urdu 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| Act III of 1867 (Gambling) as modified up to 1st December 1896 | In Nagri 1 a 3 p (1 a) |
| Ditto ditto 1st January 1905 | In Urdu 1 a (1 a) |
| Act V of 1869 (Indian Articles of War), as modified up to 1st January 1895 | In English Urdu and Nagri Bound Rs 3 (5 a) |
| Ditto ditto | Unbound. Rs 2-8 (5 a) |
| Act I of 1871 (Cattle trespass), as modified up to 1st December 1903 | In Urdu 1 a 9 p (1 a) |
| Ditto ditto | In Nagri 1 a 9 p (1 a) |
| Act XXIII of 1871 (Pensions) | In Urdu 9 p (1 a) |
| Ditto | In Nagri 9 p (1 a) |
| Act IV of 1872 (Punjab Laws) as modified up to 1st November 1904 | In Urdu. 2 a 6 p (1 a 6 p) |
| Act IX of 1872 (Contract) as modified up to 1st September 1899 | In Urdu 9 a 9 p (3 a) |
| Ditto ditto | In Nagri 9 a 6 p (3 a) |
| Act XV of 1872 (Christian Marriage) as modified up to 1st April 1891 | In Urdu 4 a (2 a) |
| Ditto ditto | In Nagri 4 a (2 a) |
| Act V of 1873 (Government Savings Bank) as modified up to 1st April 1903 | In Urdu 9 p (1 a) |
| Ditto ditto | In Nagri 9 p (1 a) |
| Act VIII of 1873 (Northern India Canal and Drainage) as modified up to 15th July 1899 | In Urdu 3 a 3 p (1 a) |
| Ditto ditto | In Nagri 3 a 3 p (1 a) |
| Act X of 1873 (Oaths) as modified up to 1st February 1903 | In Urdu 1 a (1 a) |
| Ditto ditto | In Nagri [illegible] (1 a) |

KNOX, namely, *Dil Kunwar* v. *Udai Ram* (1). In that case he held that the presumption enjoined by clause (3) of section 201 of the Agra Tenancy Act is not conclusive, even in a Revenue Court, but may be rebutted, as, for instance, by evidence showing that the plaintiff had not been in possession of the property in respect of which profits are claimed for more than 12 years before suit, and the defendants have openly denied the plaintiff's title for more than that period. In that case my brother KNOX gives his reasons for accepting this view. He referred to the case of *Niaz Ali Khan* v. *Gobind Ram*, which was at that time unreported, and which was evidently cited in argument and observed of the decision in it as follows:—"I take the decision of this Court to go no further than to say that the lower appellate court was right in presuming upon the record that the plaintiff had a proprietary right. In other words, the fact was recorded as proved because it had not been disproved." The judgement in question is reported in a foot note to the case of *Bechan Singh* v. *Karan Singh* (2). I shall quote it *in extenso*:—"This was a suit for profits by a person who is recorded as having the proprietary right entitling him to claim profits. Under sub-section (3) of section 201 of the Tenancy Act of 1901 the Court shall presume that such a person has a proprietary right. The defendant is competent to sue in a Civil Court under the *proviso to that* sub-section to establish that the plaintiff has not the proprietary right claimed by him. The court below was *therefore* right in remanding the case to the court of first instance, and we dismiss this appeal with costs." It will be observed from a perusal of this judgement that the court did not define the meaning of the words "shall presume."

The next case is that of *Dhanka Singh* v. *Umrao Singh* (3). In that case my brother RICHARDS, dissenting from the view of my brother KNOX, held that a Revenue Court is bound to act upon the presumption created by clause (3) of section 201, subject only to the result of a suit in a Civil Court. An appeal under the Letters Patent was preferred against the decision of the senior Judge in this case, and it came before my late colleague

(1) (1906) I. L. R. 29 All. 143. (2) I. L. R. 30 All., 417.
(3) Weekly Notes 1907, p. 43.

| | |
|---|---|
| Act I of 1899 [Indian Marine Act (1887) Amendment] | In Urdu 6 p (1 a) |
| *Ditto* ditto | *In Nagri 6 p (1 a)* |
| Act II of 1899 (Stamps) as modified up to 31st August 1905 | In Urdu 7 a 6 p (1 a 6 p) |
| Ditto ditto | *In Nagri 7 a 6 p (1 a 6 p)* |
| Act IV of 1899 (Government Buildings) | In Urdu 3 p (1 a) |
| Ditto | In Nagri 3 p (1 a) |
| Act VII of 1899 [Indian Steam Vessels Act (1884) Amendment] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act VIII of 1899 (Petroleum) as modified up to 1st January 1 09 | In Urdu 1 a 6 p (1 a) |
| Ditto ditto | In Nagri 1 a 6 p (1 a) |
| Act IX of 1899 (Arbitration) | In Urdu 9 p (1 a) |
| Ditto | In Nagri 9 p (1 a) |
| Act XI of 1899 (Court fees Amendment) | In Urdu 6 p (1 a) |
| Ditto | In Nagri 6 p (1 a) |
| Act XII of 1899 (Currency Notes Forgery) | In Urdu 3 p 1 a) |
| Ditto | In Nagri 3 p (1 a) |
| *Act XIV of 1899 (Tariff Amendment)* | *In Urdu 3 p (1 a)* |
| Ditto | In Nagri 3 p (1 a) |
| Act XVII of 1899 (Indian Registration Amendment) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act XVIII of 1899 (Land Improvement Loans Amendment) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act XX of 1899 (Presidency Banks) | In Urdu 3 p (1 a) |
| Ditto | In Nagri 3 p (1 a) |
| Act XXI of 1899 (Central Provinces Tenancy Amendment) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act XXIV of 1899 (Central Provinces Court of Wards) | In Urdu 1 a 3 p (1 a) |
| Ditto ditto | *In Nagri 1 a 3 p (1 a)* |
| Act I of 1900 (Indian Articles of War Amendment) | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act III of 1900 (Prisoners) as modified up to 1st March, 1905 | In Urdu 2 a 3 p (1 a) |
| Ditto ditto | In Nagri 2 a 3 p (1 a) |
| Act IV of 1900 [Indian Companies (Branch Registers)] | In Urdu 3 p (1 ) |
| Ditto ditto | In Nagri 3 p (1 ) |
| Act IX of 1900 (Court Fees Amendment) | In Urdu 3 p ( a |
| Ditto | In Nagri 3 p (1 ) |
| *Act X of 1900 (Census)* | *In Urdu 9 p (1 )* |
| Ditto | In Nagri 9 p (1 ) |
| Act II of 1901 [Indian Tolls (Army)] | In Urdu 6 p 1 ) |
| Ditto | In Nagri 9 p (1 ) |
| Act V of 1901 [Indian Forces (Amendment)] | In Urdu 3 p (1 ) |
| Ditto | In Nagri 3 p (1 a) |
| Act VI of 1901 (Assam Labour and Emigration) | In Urdu 5 a (2 a) |
| Ditto | In Nagri 5 a (2 a) |
| Act VII of 1901 (Native Christian Administration of Estates) | In Urdu 3 p (1 a) |
| Ditto ditto | *In Nagri 3 p (1 a)* |
| Act VIII of 1901 (Mines) | In Urdu 1 (1 a) |
| Ditto | In Nagri 1 a (1 a) |
| Act IX of 1901 [Indian Articles of War (Amendment)] | In Urdu 3 p (1 a) |
| Ditto ditto | In Nagri 3 p (1 a) |
| Act X of 1901 (Court Fees (Amendment) | In Urdu 3 p (1 a) |
| Ditto | In Nagri 3 p (1 a) |
| Act II of 1902 [Cantonments (House Accommodation)] | In Urdu 1 a (1 a) |
| Ditto ditto | In Nagri 1 a (1 a) |
| *Act IV of 1902 (Indian Tramways)* | *In Urdu 3 p (1 a)* |
| Ditto | In Nagri 3 p (1 a) |

KNOX, namely, *Dil Kunwar* v *Udai Ram* (1) In that case he held that the presumption enjoined by clause (3) of section 201 of the Agra Tenancy Act is not conclusive, even in a Revenue Court, but may be rebutted, as, for instance, by evidence showing that the plaintiff had not been in possession of the property in respect of which profits are claimed for more than 12 years before suit, and the defendants have openly denied the plaintiff's title for more than that period In that case my brother KNOX gives his reasons for accepting this view He referred to the case of *Niaz Ali Khan* v *Gobind Ram* which was at that time unreported, and which was evidently cited in argument and observed of the decision in it as follows —"I take the decision of this Court to go no further than to say that the lower appellate court was right in presuming upon the record that the plaintiff had a proprietary right In other words, the fact was recorded as proved because it had not been disproved" The judgement in question is reported in a foot note to the case of *Bechan Singh* v *Karan Singh* (2) I shall quote it *in extenso* — "This was a suit for profits by a person who is recorded as having the proprietary right entitling him to claim profits Under sub section (3) of section 201 of the Tenancy Act of 1901 the Court shall presume that such a person has a proprietary right The defendant is competent to sue in a Civil Court under the *proviso* to that sub section to establish that the plaintiff has not the proprietary right claimed by him The court below was therefore right in remanding the case to the court of first instance and we dismiss this appeal with costs" It will be observed from a perusal of this judgement that the court did not define the meaning of the words "shall presume"

The next case is that of *Dhanka Singh* v *Umrao Singh* (3) In that case my brother RICHARDS, dissenting from the view of my brother KNOX, held that a Revenue Court is bound to act upon the presumption created by clause (3) of section 201, subject only to the result of a suit in a Civil Court An appeal under the Letters Patent was preferred against the decision of the senior Judge in this case, and it came before my late colleague

(1) (1906) I L R 29 All. 148 (2) I L R 30 All., 41
(3) Weekly Notes, 1907 p. 43

Regulation V of 1890 (British Baluchistan Forests) ... ... In Urdu 2 a (1 a 6 p)
Regulation VI of 1893 (Hazara Forests) ... ... In Urdu 2 a (1 a 6 p)
Regulation VIII of 1896 (British Baluchistan Criminal Justice) .. In Urdu. 9 p (1 a)
Regulation IX of 1896 (British Baluchistan Civil Justice) .. ... In Urdu 2 a. 3 p (1 a)
Regulation III of 1901 (Frontier Crimes) .. .. ... In Urdu. 2 a 6 p (1 a)
Regulation IV of 1901 (Frontier Murderous Outrages) ... ... In Urdu 6 p (1 a)
Regulation VII of 1901 (North West Frontier Province) ... .. In Urdu 4 a. 3 p (1 a)

## V — MISCELLANEOUS PUBLICATIONS

Table showing Effect of Legislation in the Governor General's Council during 1898 to 1900 ... ... ... Re. 1 (1 a 6 p)
Ditto ditto during 1901 .. 6 a. (2 a)
Ditto ditto during 1902 ... 2 a 6 p. (1 a)
Ditto ditto during 1903 ... 14 a (2 a)
Ditto ditto during 1904 . 4 a (2 a)
Ditto ditto during 1905 . 3 p (1 a)

Annual Indexes to the Acts of the Governor General of India in Council from 1854 to 1905 The price is noted on each

Report of Indian Law Commission, 1879 Foolscap, Board ... Re. 1 (5 a.)

Proceedings of the Council of the Governor General of India for making Laws and Regulations, from July, 1862 to 1905 Super-royal 4to Annual subscription Rs 5 (Re 1), single issue 4 a, including postage.

Index to Indian Statutes Chronological Tables and Index of the Indian Statutes, compiled under the orders of the Government of India, by F G Wigley, of the Inner Temple, Barrister at Law. Edition 1897

A Digest of Indian Law Cases, containing High Court's Reports 1862 to 1900, and Privy Council Reports of Appeals from India, 1836 to 1900, with an Index of cases compiled under the orders of the Government of India, by J. V Woodman, of the Middle Temple, Barrister-at-Law, and Advocate of the High Court, Calcutta In six volumes Super royal 8vo Rs 72 reduced to Rs 36 for cloth bound and Rs 78 reduced to Rs 39 for quarter bound (Rs 3 12)

Single volume reduced to Rs 7 when sold separately for the first and five volumes and to Rs 5 for the sixth

A Digest of the Statutes and Acts relating to Merchant Shipping in India, Edition 1884 By T A. Pearson, Barrister-at-Law. ... Rs 5 Reduced to Rs 3 (12 a)

Index to Act V of 1869 (Indian Articles of War), as modified up to 1st January, 1895 ... ... ... ... ... 7 a (2 a)
Ditto ditto ... ... In Urdu and Nagri 7 a (2 a
Contents to ditto ... .. ... ... .. In Urdu and Nagri. 1 a 9 p (1 a)

The Baluchistan Agency Forest Law, 1890 .. .. . In Urdu 2 a (1 a 6 p)
The Quetta Municipal Law, 1896 ... ... ... ... In Urdu. 3 a 3 p (1 a 6 p)
The Baluchistan Agency Criminal Justice Law, 1896 ... ... In Urdu 9 p (1 a)
The Baluchistan Agency Civil Justice Law, 1896 ... ... In Urdu 2 a 6 p (1 a.)

erroneous" The appeal of *Gobindi* v *Saheb Ram* (1) was laid before KNOX, AIKMAN and GRIFFIN, JJ., with a view to having a final decision on the question What is the meaning in the section, of the words "shall presume" was not decided, but the effect of the judgement in that case is in my opinion to conclude the question before us In that case the plaintiff had obtained in 1901 certain shares in immovable property under a decree from the Munsif of Hathras She applied for entry of her name in the revenue papers, but owing to some error her name was recorded in respect of a larger share than she had obtained under the decree She sued the defendants for profits calculated on the share as entered in the revenue papers The defendants pleaded that the plaintiff was only entitled to profits in proportion to the share decreed in her favour and not as entered in the khewat The court of first instance decreed the claim for profits in her favour in proportion to her recorded share The lower appellate court modified the decree, holding that the plaintiff was entitled to profits proportionate to the share she had got under the Civil Court decree The plaintiffs then appealed to the High Court, and it was held that when a Civil Court of competent jurisdiction has decided a claim to property, and this has been followed by a wrong entry in the revenue papers in a subsequent suit for profits the claim must be in proportion to the share obtained under the Civil Court decree, notwithstanding the presumption enjoined by section 201 of the Agra Tenancy Act

In *Bhawani Singh* v *Dilawar Khan* (2) a like question was similarly decided by the same Bench The Judges who decided these cases did not think it necessary to interpret the words "shall presume" in the sub section, but they held that the presumption enjoined by it was rebuttable by proof of a Civil Court decree inconsistent with it Now it appears to me that if the presumption enjoined in section 201 is an irrebuttable presumption it would not be open to the Revenue Court to allow evidence to be given even of a decree by a Civil Court so as to rebut the presumption If it is open to a Revenue Court to admit a decree in evidence as proof of title and to rebut the plaintiff's claim, the presumption

(1) (1909) I. L. R., 31 All., 207. (2) (1909) I L R., 31 All., 253

# TABLE OF CASES REPORTED

are understood as defined in the Evidence Act, it necessarily follows that the Court has power to decide upon evidence produced before it the question whether the plaintiff has or has not the title recorded in the revenue papers The interpretation I would put on section 201 is intelligible in itself and is not repugnant to the context or to common sense This being the case, a court of law should not in my opinion go further and speculate as to the intention of the Legislature, or seek for another interpretation in the light of administrative expediency I would therefore concur in the order proposed by the learned Chief Justice

By THE COURT —The order of the Court is that the appeal allowed, the decree of the learned Judge of this Court set as and the decree of the lower appellate court restored, with cost all courts, save and except the costs of this appeal The pa in view of the conflict of authority, will abide their own of this appeal

## APPELLATE CIVIL

*Before Sir John Stanley Knight Chief Justice and Mr Justice Bane*

KUTUB UD DIN AHMAD AND ANOTHER (DEFENDANTS) *v* BASHIR UD (PLAINTIFF) *

*Act No IX of 1872 (Indian Contract Act) section 74—Mortgage—Provis on lower rate of interest in case of punctual payment—Penalty*

If a mortgagee stipulate for a higher rate of nterest in default of punc payment he must reserve the higher rate as payable under the mortgage provide for its reduction in case of punctual payment and if he do so he be entitled to recover the higher rate But he cannot effect his object reserving the lower rate and then fixing a higher rate in case of non paymen the lower rate at the appointed time such an agreement be ng cons dere the nature of a penalty *Wallis v Smith* (1) referred to

THIS was a suit for sale on a mortgage The mortg covenanted to pay interest at the rate of 2 per cent per mens But the mortgage deed further provided that if the annu interest was paid punctually at the end of the year the mortgage would accept it at the rate of Rs 1-4 0 per cent per mensem

* First Appeal No 181 of 1908 from a decree of G rraj Kishore Datt Sub ordinate Judge of Bareilly dated the 2nd of April 1908

(1) (1882) L R 21 Ch D 261

# TABLE OF CASES CITED

it:—"I am sorry it was so settled, because anything more irrational than the doctrine, I think, can hardly be stated. It entirely depended on form and not on substance." *Wallis* v. *Smith* (1). Now, however this be, it appears to me that an agreement on the part of a mortgagee to accept on punctual payment interest at a lower rate than the rate agreed to be paid is free from objection. It is an encouragement to punctuality in payment, which is to be commended. It is a premium for punctuality in the fulfilment of a legal obligation. If a mortgagor fail to take advantage of a term of a contract which is beneficial to him, he has himself to blame. In the document before us the provision for payment of interest is free from ambiguity. The agreement was that the mortgagor should pay compound interest at the rate of Rs. 2 per cent. per mensem, but that on punctual payment of interest, interest at the rate of Rs. 1-4-0 per cent. per mensem would be accepted. If undue influence or fraud had been proved, other considerations would arise, but the appellants have not endeavoured to support their allegation of undue influence. I, therefore, think that the decision of the court below is correct and would dismiss the appeal.

BANERJI, J.—I was inclined to hold at the hearing of the appeal that the provision in the mortgage-deed as to interest was an attempt to circumvent the rule of law as to penalties; but in the face of English authorities, and in the absence of any authority in this country to the contrary, I do not think I should be justified in so holding. I therefore agree in dismissing the appeal.

BY THE COURT:—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

(1) (1882) L. R., 21 Ch. D., 261.

# INDEX.

it:—"I am sorry it was so settled, because anything more irrational than the doctrine, I think, can hardly be stated. It entirely depended on form and not on substance." *Wallis* v *Smith* (1). Now, however this be, it appears to me that an agreement on the part of a mortgagee to accept on punctual payment interest at a lower rate than the rate agreed to be paid is free from objection. It is an encouragement to punctuality in payment, which is to be commended. It is a premium for punctuality in the fulfilment of a legal obligation. If a mortgagor fail to take advantage of a term of a contract which is beneficial to him, he has himself to blame. In the document before us the provision for payment of interest is free from ambiguity. The agreement was that the mortgagor should pay compound interest at the rate of Rs. 2 per cent per mensem, but that on punctual payment of interest, interest at the rate of Rs. 1-4-0 per cent. per mensem would be accepted. If undue influence or fraud had been proved, other considerations would arise, but the appellants have not endeavoured to support their allegation of undue influence. I, therefore, think that the decision of the court below is correct and would dismiss the appeal.

BANERJI, J.—I was inclined to hold at the hearing of the appeal that the provision in the mortgage deed as to interest was an attempt to circumvent the rule of law as to penalties; but in the face of English authorities, and in the absence of any authority in this country to the contrary, I do not think I should be justified in so holding. I therefore agree in dismissing the appeal.

BY THE COURT:—The order of the Court is that the appeal be dismissed with costs

*Appeal dismissed.*

(1) (1882) L R, 21 Ch. D, 261.

PAGE.

learned Judicial Commissioner and the Additional Judicial Commissioner acting under clause (*b*) of section 9 of Act No XIV of 1891, have jointly stated the question as to which they have differed, and have forwarded such statement with their respective opinions to this Court The question on which the members of the Court differed is whether the accused, who are constables should be acquitted on the ground that they acted under the orders of the Inspector and Sub Inspectors No definite orders, the reference proceeds to say, to the constables have been proved, but one of the learned members of that Court is disposed to think and the other holds definitely, that it should be assumed in favour of the constables that they acted under the orders of the Inspector and of the Sub-Inspectors

The Judicial Commissioner was of opinion that all the accused proceeded to the *kutti* or hut near the *abadi* of mauza Gokulpur with criminal intent; that it was proved that the constable Ghaus Ali wrote out the original report made to the police knowing it to be false, that the constable Wajid Husain prepared the special diary which followed upon the report in a manner which he knew to be incorrect, that after that Ghaus Ali and Wajid Husain assisted the Inspector and the Sub Inspector Wazir Khan to prepare the false statement which was made by the witness Shankar, and that the constable Lachman also took part in this He was disposed to hold that, even if the constable acted under express orders from the Inspector and Sub Inspectors they did so knowing that these orders were unlawful, and therefore they were not bound to obey them, and are not protected by these orders from liability

The learned Additional Judicial Commissioner on the other hand, being of opinion that it was reasonable to hold that the constables may have proceeded to the *kutti* in ignorance of the plan devised by the Inspector and Sub-Inspectors, held that the prosecution had failed to prove that the constables set out to the *kutti* with criminal intention, and that as no other act is proved against them to show that they knew of the conspiracy before the arrests were made, they were, as regards the subsequent acts, protected by the orders of the Inspector, under which it must be presumed that they acted.

above, examined the record, and specially the statements made by the accused throughout the case, and we have also examined the pleas taken by the learned counsel, a barrister of standing and experience, who appeared on their behalf in the Judicial Commissioner's Court The result of our search is that in the court of the committing Magistrate, Wajid Husain alone set up a plea of this nature, he said that he had written what he did in the diary under orders of the Inspector When we come to the appeals we find that in the case of Mata Din and Lachman no plea in any way touching a defence based upon section 76 Indian Penal Code, was raised; that Ghaus Ali does not appear to have sent in any petition of appeal, that Wajid Husain in the petition sent in by him by way of appeal does say that whatever he did was done at the instance of his superior officers, that it was incumbent upon him to obey the orders of the Circle Inspector in the discharge of his duty, that he was not free to go against his officers in the matter or to disobey their orders, and that as he was bound under the law to act according to the instructions of his officers, he cannot therefore be held to be guilty To the same effect is the appeal of Ram Kuber and of Najaf Khan Muhammad Husain says in his petition —"The appellant was with his superiors and carried out all the lawful orders given by them Had he disobeyed them he would have been punished How could he have acted independently in the presence of his superiors?" In the petition filed on behalf of the appellants by the learned barrister who appeared for them in the Judicial Commissioner's Court, this particular plea does not appear to have been put forward The petition discloses 14 grounds of appeal more or less bearing upon the plea that the case of dacoity was a true case and had not been proved to be false. It is true that in paragraph 13 there is a plea to the effect that the defence has been proved, but as we have already pointed out, we cannot, save in the solitary case of Wajid Husain, find in the various examinations taken of those accused persons that they anywhere specifically stated that they had received orders from superior officers and that they only carried out such orders None of the orders, if there were any, was produced in evidence No one was

conduct and public and private business in relation to the facts of the particular case. It is quite natural to assume, as the learned *Judicial Commissioners did in this case, that the accused persons*, being police officers, acted as they did in consequence of orders given to them by their superiors. The conflict lies between what the court may presume and what the Court shall presume. Where the law requires that the Court shall presume the absence of these special circumstances, the Court must continue to presume their absence unless and until their absence is disproved, or in other words, their presence is proved.

The Evidence Act in laying down the principle set forth in section 105 has at times been said to have introduced something new and to have put the law regarding criminal cases upon a different basis than the one upon which it stood before it was enacted. We are unable to take this view. Undoubtedly, in criminal trials the *onus* of proving every particular element, if we may use the term, which goes to the making of an offence lies upon the prosecution, and if the prosecution do not prove all such elements, and room is left for doubt, the benefit of that doubt must unquestionably be given to the accused. But there are several cases both in English and in Indian case law, which satisfy us that in enacting section 105, the Legislature laid down no new principle, but put in a crisp and rigid form that which was before generally acted upon: *vide King* v *Turner* (1), *Rex* v *Hand* o *s*, quoted in Russell on Crimes, Vol 3, p 407, *Reg* v *James Johnson* (2). In the case of most general exceptions the circumstances which bring the case within a general exception are circumstances within the special knowledge of the accused person and lie within the rule that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

However, it is not for us to consider whether the principle enacted in section 105, Evidence Act, was a new or an old principle. It is sufficient that it has been carefully and distinctly laid down by law, and we have no alternative but to follow it. We have gone into the matter at this length because we wish to show that we would have been prepared to go into the question,

(1) (1816) 5 M and S., 206. (2) (1903) 1 Q B., 640

# APPELLATE CIVIL.

*Before Mr. Justice Griffin and Mr. Justice Tudball.*

RAM PRASAD BHAGAL (PLAINTIFF) *v.* SUBA RAI AND OTHERS (DEFENDANTS).*

*Act (Local) No. II of* 1901 (*Agra Tenancy Act*), *sections* 74, 75 *and* 76—*Definition*—"*Crops or other products*"—*Jasmine and bela plants*

*Held* that jasmine and *bela* plants come under the category of crops or other products within the meaning of sections 74, 75 and 76 of the Agra Tenancy Act, 1901. *Sheo Pershad Tewary* v. *Mussumat Moleema Beebee* (1) and *Abdul Baki* v. *Mathura Prasad* (2) referred to

THE facts of this case were as follows:—

The plaintiff, who was a sub-tenant of the defendants, used the land for cultivating jasmine and *bela* plants. The defendants sued in ejectment, and the Assistant Collector ordered the plaintiff's ejectment conditional on the payment of compensation. On appeal, the Commissioner set aside the order for compensation, and remarked that the plaintiff's remedy was under section 76, clause (1), of the Tenancy Act. The plaintiff then brought the present action for adjudication of the price of the jasmine and *bela* plants and claimed Rs. 572. The Assistant Collector decreed the suit for the full amount. The District Judge on appeal, reduced the amount to Rs. 125 on the ground that the tenant was entitled to the price of "the crops or of other products," but not to the price of *bela* and jasmine plants

The plaintiff appealed:

The appeal first came on for hearing before Mr. Justice Karamat Husain, who, on 6th August, 1909, referred the case to a Bench of two Judges, by the following order:—

"The plaintiff in this case was the sub tenant of a *sir* holding of the defendants and used the land for cultivating 'jasmine' and '*bela*.' The defendants instituted a suit for the ejectment of the plaintiff and the Assistant Collector ordered his ejectment conditional on the payment of a compensation of Rs 572 and odd The plaintiff appealed to the Commissioner, who set aside the order for compensation and remarked that the plaintiff's remedy was under section 76 clause (1) of the Agra Tenancy Act. The plaintiff

* Second Appeal No 129 of 1909, from a decree of Sri Lal District Judge of Ghazipur dated the 7th of December, 1908, modifying a decree of Nazim-ud-din Ahmad, Assistant Collector, first class, of Ballia, dated the 17th of August 1908

(1) (1870) N W P., H C Rep., 103. (2) Weekly Notes, 1873, p 21

the present appeal is that the defendant not having claimed a set-off against the plaintiff's claim, no decree could be passed in his favour for any money due to him from the plaintiff on the taking of accounts In our opinion this plea is not well founded It is true that the plaintiffs in their plaint claimed that a decree might be granted for whatever might be found due on the taking of accounts; nevertheless the plaintiffs' suit was in truth and in fact a suit for accounts against an agent In our opinion such a suit necessarily involves an undertaking by the plaintiff to pay to the defendant any sum that may be found due to the defendant by him on the taking of accounts, and it is unnecessary that the defendant should plead a set-off or counter claim We think that the decree of the court below was quite justified by the provisions of sections 215A and 216 of Act XIV of 1882, which was in force at the time of making the decree In the written statement the defendant expressly stated that on taking of accounts a certain sum would be found due to him. The appellants rely on the ruling in the case of *Nan Karay Phaw* v. *Ko Htaw Ah* (1). In our opinion this ruling does not apply There the defendant denied the partnership and had made an independent claim against the plaintiff. We dismiss the appeal with costs.

1910

PARMANAND v JAGAT NARAIN

*Appeal dismissed.*

---

*Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji*

CHUNNU DATT VYAS (DEFENDANT) v BABU NANDAN (PLAINTIFF) *

1910 *April 8*

*Civil Procedure Code (1908) section 9—Suit for declaration and injunction—Right to perform Ram Lila such performance not being connected with any shrine or temple and being supported by purely voluntary contributions—Suit not maintainable—Jurisdiction*

The plaintiff a minor, sued for a declaration that he had the right to perform certain religious pageants in Benares and to receive subscriptions in connection therewith, and claimed an injunction to restrain the defendant from interfering with that right. It was found that these pageants had been performed for many years past by the plaintiff s father, grandfather and great grand father with the aid of voluntary subscriptions from the Hindu community But the pageants were not connected with any particular temple, shrine or sacred spot, nor did the plaintiff or his ancestors hold any office by virtue of wh ch they were under any obligation to perform such pageants The performance thereof

---

* Appeal No. 101 of 1909, under section 10 of the Letters Patent.

(1) (1886) I. L. R., 13 Calc., 124

not entitled to levy a distress on guava trees Section 42 of Act XII of 1881, which reproduced the corresponding section of Act XVIII of 1873, provided that a tenant ejected in accordance with the provisions of the Act shall be entitled to any growing crops or other ungathered products of the earth, belonging to him and growing on the land at the time of his ejectment and to use the land for the purpose of tending and gathering in such crops or other products, paying sufficient rent therefor

In the case of *Abdul Baki* v. *Mathura Prasad* (1), which came before the Board of Revenue of these Provinces, the question for decision was whether the term 'growing crops' used in section 42 of the Rent Act, included rose and jasmine plants as well as the flowers they bore. It was held by the members of the Board of Revenue that the words 'growing crops" did so include the rose and jasmine plants, as well as their flowers. By section 76 of the Tenancy Act, II of 1901, the tenant is given a right to sue for an adjudication as to the price of crops and other products of his holding. The preceding sections 74 and 75 have to be read along with section 76 Section 74 gives the tenant a right to use the land for the purpose of growing, tending, gathering and removing crops and all other products of the earth, but provides that he shall not be entitled, in the absence of a contract or local usage to the contrary, to cut or remove any trees upon his holdings. Section 75 is as follows :—" If at the date on which the ejectment takes effect there are ungathered crops or other products upon the land the landholder shall have the option of purchasing the same, and upon his forthwith tendering the price of the same to the tenant the right of the tenant to such crops or other products, and to use the land for the purpose of tending, gathering and removing the same shall cease. If the landholder does not elect to purchase the same, the tenant shall be entitled to use the land as aforesaid for a further period until such crops or other products have been gathered and removed, paying a fair rent therefor"

The words " other products " in section 76 must be read as meaning other products of the earth and other products upon land referred to in sections 74 and 75. We think that the

(1) Weekly Notes 1903,

entire Hindu community some 25 years ago, that he has been performing the duties of the office receiving fees for the same and managing the same

'The court of first instance held that the suit was cognizable, that sanction for its institution under section 539 of the Code of Civil Procedure was not required, that the defendant is only a *Vyas* and nothing more that he has no right of management, and that his acting as *Vyas* has been with the implied consent of Murli Dhar Mahant and Dina Nath *Vyas* It accordingly decreed the plaintiff's claim

"In appeal the District Judge confirmed the view taken by the Munsif that the defendant acted merely as a subordinate official under the plaintiff and cannot question the plaintiff's right to manage the pageant He held that the plaintiff's right to act as Mahant of the Lila should be recognized and the defendant prohibited from interfering with it in any way The defendant was specially prohibited from receiving any subscription, or offerings at the Ram Lila, and from interfering in its management except under the order and with the consent of the plaintiff He was however, to remain *Vyas* of the Chittra koot Ram Lila pageants receiving such perquisites as he had hitherto been receiving

'The plaintiff comes here in second appeal and contends that as he has been found by the court below to be Mahant of the Ram Lila, the defendant should not be held entitled to continue as *Vyas* of the same

The defendant is not a fit and proper person to continue as *Vyas* and is liable to dismissal or removal at any time The defendant filed objections under section 561 contending that he is entitled to exercise all the rights of the Ram Lila, including riding on the *viman* (this is the technical name of the chariot of the gods at times their throne and at others their chariot) and the plaintiff should not have been held proprietor of the Ram Lila

'On an order of this court it has also been found by the court below, that no portion of the recitation of the Ramayan which is done under the direction of the *Vyas* takes place at any temple or shrine Both sides agree that this is a correct finding The District Judge has also found that the subscriptions and offerings taken in connection with the pageant are not taken in connection with any temple or shrine The plea as to jurisdiction was hotly urged No case exactly on all fours was put before me as a precedent

'Section 11 of Act XIV of 1882 lays down that the court shall have jurisdiction to try all suits of a civil nature unless the suits be such that the cognizance of them by a Civil Court is barred by any enactment for the time being in force It is not suggested that any enactment stand in a bar The argument is that the subject matter of the suit is not one for which any action of a civil nature will lie

'In this connection the explanation attached to section 11 is of importance That explanation in clear words says that the right to property or to an office is expressly understood by the law in force in India as a suit of a civil nature On behalf of the respondent the answer to this that the pageant, although religious services are performed in connection with it, in substance does not differ from a procession organised and conducted by volunteers The subscriptions

not entitled to levy a distress on guava trees Section 42 of Act XII of 1881, which reproduced the corresponding section of Act XVIII of 1873, provided that a tenant ejected in accordance with the provisions of the Act shall be entitled to any growing crops or other ungathered products of the earth, belonging to him and growing on the land at the time of his ejectment and to use the land for the purpose of tending and gathering in such crops or other products, paying sufficient rent therefor

In the case of *Abdul Baki* v *Mathura Prasad* (1), which came before the Board of Revenue of these Provinces the question for decision was whether the term 'growing crops' used in section 42 of the Rent Act, included rose and jasmine plants as well as the flowers they bore It was held by the members of the Board of Revenue that the words 'growing crops" did so include the rose and jasmine plants, as well as their flowers By section 76 of the Tenancy Act, II of 1901, the tenant is given a right to sue for an adjudication as to the price of crops and other products of his holding The preceding sections 74 and 75 have to be read along with section 76 Section 74 gives the tenant a right to use the land for the purpose of growing, tending, gathering and removing crops and other products of the earth, but provides that he shall not be entitled, in the absence of a contract or local usage to the contrary, to cut or remove any trees upon his holdings Section 75 is as follows —" If at the date on which the ejectment takes effect there are ungathered crops or other products upon the land the landholder shall have the option of purchasing the same, and upon his forthwith tendering the price of the same to the tenant the right of the tenant to such crops or other products, and to use the land for the purpose of tending, gathering and removing the same shall cease If the landholder does not elect to purchase the same, the tenant shall be entitled to use the land as aforesaid for a further period until such crops or other products have been gathered and removed, paying a fair rent therefor"

The words "other products" in section 76 must be read as meaning other products of the earth and other products upon land referred to in sections 74 and 75 We think that the

(1) Weekly Notes 1873

"On the other hand it is an ordinary suit brought by a master for an injunction restraining his servant from interfering with the master and continuing to act as he acted before with the permission and consent of such master.

"Now I am not at all satisfied that the test to be applied to a case of this kind is, if I may so term it, the 'topical' test. India is a country where open air pageants have been recognized and organized for centuries past and are still organized and recognized without any limitation to a particular shrine or temple. Year by year in all Hindu cities of any importance the Ram Lila is organized and conducted not as an appanage of any particular temple.

"The Munsif who tried the case in the first instance was a Hindu gentleman dealing with matters of which he must have considerable knowledge as a Hindu. The learned Judge who tried the case in first appeal was also a Hindu gentleman whose reputation for knowledge in these questions is a matter of public notoriety.

"Both these courts held that these pageants which apparently all form various parts of the Chittrakoot Ram Lila, are celebrated from public subscriptions, that the Chittrakoot Ram Lila belongs to the Mahant who has been the plaintiff's great grandfather Brindaban, his grandfather Ramji, his father Muli, and now to him the plaintiff. The will dated 19th August, 1893, shows that the testator was the Mahant of the Ram Lila and that it was to continue as it had continued in his time. The evidence also shows that the Mahant is in charge of the dresses and other property of the Lila and collects subscriptions and defrays the expenses, taking the profits and losses. The public of Benares who subscribe to the fair say they are not its owners. The office has continued from father to son and the show is said by some of the witnesses to be as old as the time of one Megha Bhagat who flourished in Sambat 1600 or there about. It is not known who was the Mahant before Brindaban. But from him downwards to the plaintiff the evidence is very unanimous. The Mahantship is thus an office with certain duties attached to it. It has also certain rights attached to it and is not a mere dignity.

"It seems to me that some help can be gained from the principles laid down by their Lordships of the Privy Council in the case *Sri Sunkur Bharti Swami* v. *Sidha Lingayah Charanti* (1). Here the right claimed by a Mahant was a right to be carried crossways in a *palki* in the heart of a religious procession. In dealing with the issue raised in this case their Lordships observe as follows:—'The usurper of a dignity is guilty of a wrong which is, to a certain degree prejudicial to every one who has a just title to the dignity, and the manner in which such a wrong is to be redressed must depend upon the municipal laws of each particular country. There may be no remedy, except by application to the executive Government, to punish the usurpation, or there may be a remedy to every one whose dignity is lowered by the usurpation in a right of action against the usurper. Even in this country it would appear that in ancient times, when armorial bearings were assumed without authority, the family who had a right to bear them might sue in the court of the Earl Marshal and might obtain an inhibition. The right of *adari palki* is of quite as substantial a nature, and the Western nations who attach so much importance to titles, orders and decorations, have no

(1) (1843) 3 Moo., I.A., 198 (217).

not entitled to levy a distress on guava trees Section 42 of Act XII of 1881, which reproduced the corresponding section of Act XVIII of 1873, provided that a tenant ejected in accordance with the provisions of the Act shall be entitled to any *growing crops or other ungathered products of the earth*, belonging to him and growing on the land at the time of his ejectment and to use the land for the purpose of tending and gathering in such crops or other products, paying sufficient rent therefor

In the case of *Abdul Baki* v. *Mathura Prasad* (1), which came before the Board of Revenue of these Provinces, the question for decision was whether the term 'growing crops' used in section 42 of the Rent Act, included rose and jasmine plants as well as the flowers they bore It was held by the members of the Board of Revenue that the words "growing crops" did so include the rose and jasmine plants, as well as their flowers By section 76 of the Tenancy Act, II of 1901, the tenant is given a right to sue for an adjudication as to the price of crops and other products of his holding The preceding sections 74 and 75 have to be read along with section 76 Section 74 gives the tenant a right to use the land for the purpose of growing, tending, gathering and removing crops and other products of the earth, but provides that he shall not be entitled, in the absence of a contract or local usage to the contrary, to cut or remove any trees upon his holdings Section 75 is as follows —"If at the date on which the ejectment takes effect there are ungathered crops or other products upon the land the landholder shall have the option of purchasing the same, and upon his forthwith tendering the price of the same to the tenant the right of the tenant to such crops or other products, and to use the land for the purpose of tending, gathering and removing the same shall cease If the landholder does not elect to purchase the same, the tenant shall be entitled to use the land as aforesaid for a further period until such crops or other products have been gathered and removed, paying a fair rent therefor"

The words "other products" in section 76 must be read as meaning other products of the earth and other products upon land referred to in sections 74 and 75 We think that the

(1) Weekly Notes 1893,

or temple, they make the present case a suit in which the right not only to a dignity but to an office with perquisites and emoluments, is contested.

"I hold, therefore, that this part of the plaintiff's suit is clearly cognizable by the Civil Court.

"As regards the second portion of the suit, it has been found by the lower appellate court that the defendant holds office by the consent and appointment of the plaintiff The learned Judge describes the defendant as a subordinate official under the plaintiff.

"It is difficult to understand how after that finding the learned Judge held that the defendant should not be obstructed in acting as *Vyas* of the show so long as he conducts himself properly.

"The plaintiff's allegation in the plaint concerning this part of the case is that the defendant, who was engaged to help, has begun to interfere in every part of the Ram Lila, to act against the wishes of respectable persons of Benares, has been acting against the right of the plaintiff and his ancestors, to tell people privately that he is he proprietor of the Ram Lila, &c, and has misappropriated offerings made at the Chittrakoot and Ram Lila pageants. All this was denied by the defendant. The lower appellate Court in a somewhat confused finding holds that the defendant has while acting as *Vyas*, forced himself into public notice, has not been using his power well and has been lording it over the officials and other people connected with the Ram Lila Upon this finding I consider the plaintiff is entitled to ask that the defendant be perpetually enjoined from the assertion of rights and commission of acts contrary to the right of the plaintiff.

"What has to be considered is whether, on the whole, the conduct of the respondent has been such as to amount to a breach of confidence. The acts complained of are not simple isolated acts, they are many and repeated.

"This being so, I decree the appeal, set aside the decree of the court below and restore that of the court of first instance. The appellant will get the costs of this appeal The objection is dismissed with costs"

The defendant thereupon appealed under section 10 of the Letters Patent

Dr. *Satish Chandra Banerji*, for the appellant:—

The suit was not a suit of a civil nature within the meaning of section 9 of the Civil Procedure Code. The case of *Sri Sunkur Bharti Swami* v. *Sidha Lingayah Charanti*, (1) on which the plaintiff relied did not decide the point under consideration. No right to property or office was involved in the present suit, as the payments were purely voluntary. The public at Benares could not be compelled either to subscribe or to entrust the management of the show to the plaintiff. It was open to anybody to organize a similar pageant and the plaintiff could not get an injunction.

(1) (1843) 3 Moo. I. A., 198.

1910

CHUNNU DATT VYAS v. BABU NANDAN

He cited *Sri Sunkur Bharti Swami* v *Sidha Lingayah Charanti* (1), *Krishnama* v *Krishnasami* (2), *Kali Kanta Surma* v *Gouri Prosad Surma Bardeuri* (3), *Mamat Ram Bayan* v *Bapu Ram Atai Bura Bhakat* (4) and *Siyad Hashim Saheb* v *Siyad Ahmed Saheb* (5)

Dr *Satish Chandra Banerji*, in reply

The alleged right of the plaintiff was not to an 'office' within the meaning of section 9 of the Civil Procedure Code There could be no such office unless there were some duties imposed on the plaintiff The public at Benares had no right to compel the plaintiff to perform the Lila In the case in I. L R, 17 Calc, the offerings had to be made out of temple funds The effect of a decree in favour of the plaintiff would be to give him an exclusive right It could not avail against the community at large at Benares The people at Benares had no corresponding right against the plaintiff and he was under no obligation to organize the pageant every year

STANLEY, C J, and BANERJI, J —In the suit out of which this appeal has arisen, the plaintiff respondent, Babu Nandan, seeks a declaration that he has a right to perform at Benares a religious pageant (Ram Lila), styled *Chittrakoot, Narsingh Lila, Bawan Dvadashi* and *Holi*, which are performed every year from *Kuar Badi* 9th to *Kuar Sudi* 15th, and to receive the offerings given on the occasion and to realize subscriptions, and for an injunction to restrain the defendant from interfering in any way with the plaintiff's right to perform these ceremonies and from receiving subscriptions and offerings, or from taking any income which might accrue from the said pageants.

The defendant in his written statement, amongst other pleas, denied the right of plaintiff to perform the *Lila*, alleging that it was performed on behalf of and by the aid of all the *Hindu* community He denied that the pageants in question were exclusively performed by the plaintiff, and he further pleaded that the claim was not cognizable by a Civil Court He also asserted that he was appointed *Vyas* of the *Lila* 25 years ago and has been performing the duties of that office ever since and been in receipt of the fees for the *puja* He further alleged that he, under the

(1) (1843) Moo I. A 198
(2) (1879) I L R. 2 Mad, 62
(3) (1890) I L R., 17 Calc 906.
(4) (1887) I L R., 15 Calc, 159.
(5) (1885) I L R, 13 Bom 427

# THE INDIAN LAW REPORTS.

*Published in FOUR SERIES, viz.—*

CALCUTTA, MADRAS, BOMBAY AND ALLAHABAD.

THE Indian Law Reports, published under the authority of the Governor General in C are printed in monthly parts, which are issued, as soon as possible after the first of each m Calcutta, Madras, Bombay and Allahabad, respectively

[illegible]

Persons desiring to subscribe for or purchase the reports should apply to—
the Officer in charge, Bengal Secretariat Book Dépôt, Calcutta, or
the Superintendent, Government Press, Madras, or
the Superintendent, Government Central Press, Bombay, or
THE CURATOR OF GOVERNMENT BOOKS, *United Provinces, Allahabad.*

## PRICES.

The terms of subscription, and the terms on which current issues and back numbers are as follows:—

| | Without postage | With Indian postage | With Foreign postage |
|---|---|---|---|
| | Rs. a. p. | Rs. a. p. | Rs. a. |
| COMPLETE SERIES— | | | |
| Current issues, per annum ... ... | ... | 22 [illegible] | 28 0 |
| Back numbers, per annum ... ... | 20 0 0 | 22 [illegible] | 28 0 |
| CALCUTTA SERIES— | | | |
| Current issues, or back numbers, per annum | 10 0 0 | 12 | 14 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | | |
| Current issues or back numbers, per annum | 6 0 0 | 7 | [illegible] |
| ANY MONTHLY PART— | | | |
| Calcutta Series ... ... ... | 2 0 0 | 2 | [illegible] |
| Madras, Bombay or Allahabad Series .. | 1 0 0 | 1 0 | [illegible] |

*All payments must be made in advance* Remittances to Calcutta should be addressed to the TREASURER, BENGAL SECRETARIAT, *Writers' Buildings, Calcutta*

### PARTS OUT OF STOCK AND DUPLICATE COPIES

WHEN a requisition is received for any set of the reports, and any Parts are out of stock, the following deduction from the foregoing rates is made for such Parts:—

| | Without postage | With Indian postage |
|---|---|---|
| | Rs. a. p. | Rs. a. |
| CALCUTTA SERIES | | |
| All Parts for one year .. ... ... ... | 7 2 6 | 8 8 |
| Any one Part ... ... ... | 0 8 9 | 0 10 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | |
| All Parts for one year ... ... ... | 4 4 6 | 4 11 |
| Any one Part .. ... ... ... | 0 5 3 | 0 5 |

If any Part is lost in transit to a subscriber, and the fact is reported to the office within three months from the date of publication, a duplicate will be supplied at the following rates:—

| | Without postage | With Indian postage |
|---|---|---|
| | Rs. a. p. | Rs. a. p. |
| CALCUTTA SERIES ... ... ... | 0 8 9 | 0 10 3 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES ... | 0 5 3 | 0 5 9 |

### REPRINTS.

THE Complete Series for the years 1878, 1879, 1880, 1883, 1884, 1885, 1886, 188[illegible], 1889 1891 [illegible] 1894 1895, 1896, 1897, 1898, 1899 1901, 1903, and 1906 to 1909 has been reprinted, and may be purchased at the Bengal Secretariat Book Dépôt, Calcutta, either wholly or in part. All [illegible] required to complete the stock of the Reports for other years are now being reprinted. Complete sets of the Reports from the beginning to date will therefore shortly be available at the Bengal Secretariat Book Dépôt

### ADVERTISEMENT FOR THE CALCUTTA SERIES

ADVERTISEMENTS of law publications only are received. Rates can be ascertained on application to the Bengal Secretariat Book Dépôt.

SEVERAL volumes of the Full Bench Rulings, Parts I and II, are available at the Bengal Secretariat Book Dépôt, Calcutta, at the following rates:—

| | Without postage | With Indian postage |
|---|---|---|
| | Rs. a. p. | Rs. a. p. |
| FULL BENCH RULINGS, Parts I and II ... ... | 20 0 0 | 22 8 0 |

distinction referred to, ruling that in the former description of cases, a suit in a Civil Court will not lie while for the latter it will." Then the learned Judge remarked :—"The offerings made to a family priest by his employers according to the learned Judges should not be subject matter for a suit cognizable by the Civil Court, but a suit for the right to offerings collected at a shrine or temple from worshippers or pilgrims would be a suit cognizable by the Civil Court." He then observes :—"It was in consequence of this argument that I referred to the court below the issues upon which findings have now been returned. If no other point arose for consideration in this case I should find it difficult to distinguish the present case from those already quoted." Then he goes on to observe :— But it seems to me that we have in this suit to remember that while the plaintiff is on the one hand suing for a declaration that he has a right to perform and to conduct these pageants and to receive the offerings thereof, he is also asking for an injunction restraining the defendant from interfering in any way with his rights in the conduct of these pageants. The suit is not one for a declaration that he is entitled to receive fees or subscriptions from persons whether they are willing or unwilling to pay such fees and subscriptions." He then reviews the authorities and dealing with the subscriptions received by the organizers of the *Lila*, observes :—"I do not think that in the present case it can be said that the subscriptions, voluntary though they are are mere symbols of recognition and marks of respect. They are apparently of a more substantial nature than that, and although they are not connected with any particular shrine tree or temple they make the present case a suit in which the right not only to a dignity but to an office with perquisites and emoluments is contested." He therefore held that the plaintiff's case was cognizable by the Civil Court.

From this decision this appeal under the Letters Patent has been preferred. The only contention put forward on behalf of the appellant before us is that the suit is not cognizable by a Civil Court.

Now let us see what are the facts. The plaintiff is a youth of tender years, who cannot for years to come organize and manage a pageant. The suit was filed on his behalf by Jamna Prasad,

The Bombay Code, Vol I, Third Edition, 1907 ... Rs 4 (8 a)
Ditto Vol II, Third Edition 1907 ... Rs 6 (8 a)
Ditto Vol III, Third Edition, 1908 ... Rs 5 (8 a)
Ditto Vol IV, Third Edition, 1909 ... Rs 4 (8 a)
Volumes I to IV Reduced to Rs 11 per set.
The Coorg Code, Third Edition, 1908 ... Rs 2 (4 a)
E B & Assam Code, Vol I, Edition, 1907 ... Rs 6 (10 a)
Ditto Vol II, Edition 1907 ... Rs 6 (9 a)
Ditto Vol III, Edition, 1907 Rs 6 (9 a)
Volumes I to III reduced to Rs 16 per set
The United Provinces Code, Vol I, Fourth Edition 1906 consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table Rs 5 (8 a)
The United Provinces Code, Vol II, Fourth Edition, 1906, consisting of the *Acts of the Lieutenant Governor of the United Provinces* of Agra and Oudh in Council and lists of the enactments which have been declared in force in, or extended to the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874, with an Index Rs 10 (Re 1) for both Vols or Rs 5 (8a) for each Volume
The United Provinces Code, Vols I and II reduced to Rs 7 per set

*In the Press*

A new edition of the Burma Code

## II —REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION

Act I of 1846 (Legal Practitioners) as modified up to 1st October, 1907 ... 2 a (1 a)
Act XXI of 1850 (Removal of Caste Disabilities) with foot notes 1 a. 6 p (1 a)
Act XXXVII of 1850 (Public Servants Inquiries), as modified up to 1st August 1908 ... 11 a (1 a)
Act XXX of 1852 (Naturalization of Aliens), as modified up to 30th April 1908 ... 2 a (1 a)
Act XX of 1853 (Legal Practitioners) as modified up to 1st September, 1907 ... 1 a 9 p (1 a)
Act XXIV of 1854 (Malabar War—Knives) with foot notes 1 a 3 p (1 a)
Act XXIII of 1855 (Administration of mortgaged Estates), as modified up to 1st October, 1908 1 a 3 p (1 a)
Act XXIV of 1855 (Penal Servitude), as modified up to 1st January, 1909 ... 2 a (1 a)
Act XIII of 1857 (Opium), as modified up to 1st August, 1908 4 a 3 p (1 a)
Act XXVII of 1857 (Madras University) with foot notes ... 2 a 9 p (1 a)
Act IX of 1859 (Forfeiture) as modified up to 1st October 1908 ... 1 a. 9 p (1 a)
Act XXIV of 1859 (Madras District Police) as modified up to 1st November, 1907 ... 3 a 6 p (2 a)
Act XVI of 1863 (Excise Duty on Spirits), as modified up to 1st October 1908 ... 2 a (1 a)
Act XXXI of 1863 (Gazette of India) with footnotes ... 1 a 3 p (1 a)
Act XV of 1864 (Indian Tolls) as modified up to 30th June 1909 1 a 9 p (1 a)
Act X of 1865 (Succession) as modified up to 1st April, 1909 ... Rs. 1-8 (3 a)
Act XXII of 1867 (Sarais and Paraos) as modified up to 1st August, 1908 ... 2 a (1
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907... 8 a (1 a)

191
Chunn
Datt
v
Bab
Nand

A number of cases have been cited, but none of them closely resembles the case before us. In the view which we take it is unnecessary to refer to the majority of these cases. The case which perhaps most nearly resembles the present is that of *Tholappala Charlu* v. *Venkata Charlu* (1). In that case the plaintiff as Anagundi Raja Guru claimed to be entitled to the hereditary office of Samayacharam, which was not connected with any particular temple, and no specific pecuniary benefit was attached to it. The duties of the office were to exercise spiritual and moral supervision over persons wearing certain caste marks in a certain tract of country. The defendants claimed the office and had collected voluntary contributions in the character of the holders of such office. It was held that the suit was not cognizable by a Civil Court. This case is unlike the case of *Srinivasa* v. *Tiruvengada* (2), in which the plaintiffs claimed an hereditary right to distribute water and a gold crown to certain persons at a certain festival in a temple at Sriangam. In that case the courts found that the plaintiffs had established their claim to the hereditary office mentioned in the plaint. In delivering judgement, Collins, C. J., and Parker, J., described the ordinary test as to whether a suit of the kind was cognizable or not as follows:— "The ordinary test is whether there is any specific benefit attached to the office claimable in the nature of wages, however small that benefit may be. If there be, the right to such benefit is a question which the courts are bound to entertain." In deciding that the suit was maintainable, they pointed out that the plaintiffs had a status in the temple as holders of a certain hereditary office and when that status was violated they were entitled to be protected by such processual remedies as were available in the circumstances of the case, even though no legal dues or damages were payable to them. In this case the plaintiffs held an hereditary office, which differentiates it from the case before us.

In the case of *Hur Lall* v. *Jeorakhan Lall* (3), referred to above, the plaintiff sued the defendants for a share in moneys which they alleged had been collected by the defendants by asking alms in the city of Kanauj and to a share in which the

(1) (1895) I. L. R. 19 Mad. 62. (2) (1888) I. L. R. 11 Mad. 450.
(3) (1862) S. D. A. N. W. P. 314.

Act XVI of 1899 (Northern India Canal and Drainage) with foot-notes, 1 a (1 a)

Act X of 1904 (Co-operative Credit Societies) with reference to rules under the Act ... ... .. 5 a 6 p (1 a)

Regulation III of 1818 (Bengal State Prisoners Regulation) as modified up to 1st August, 1909 ... .. .. 2 a 9 p (1 a)

Regulation I of 1890 (British Baluchistan Laws Regulation), as modified up to 1st June, 1909 ... .. ... 3 p (1 a)

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COU AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1907 up to date.

Regulations made under the Statute 33 Vict, Cap 3, from 1907 up to date

The above may be obtained separately The price is noted on each ]

## IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL INDIA IN COUNCIL.

| | | |
|---|---|---|
| Act XXI of 1850 (Caste Disabilities), with foot notes . | In Urdu. | 3 p (1 a) |
| Ditto ditto .. | In Hindi | 3 p (1 a) |
| Act XXXVII of 1850 (Public Servants Inquiries), as modified up to 1st August, 1908 ... ... ... ... ... | In Urdu | 3 p (1 a) |
| Ditto ditto ... | In Nagri | 9 p (1 a) |
| Act XIII of 1857 (Opium), as modified up to 1st August, 1908 .. | In Urdu | 9 p (1 a) |
| Ditto ditto ... | In Nagri. | 9 p. (1 a) |
| Act IX of 1859 (Forfeiture), as modified up to 1st October, 1908 .. | In Urdu | 3 p (1 a) |
| Ditto ditto ... | In Nagri | 3 p (1 a) |
| Act XVI of 1863 (Excise), as modified up to 1st October, 1908 ... | In Urdu | 3 p (1 a) |
| Ditto ditto . | In Nagri | 3 p (1 a) |
| Act XXXI of 1863 (Official Gazette) with footnotes ... ... | In Urdu | 3 p (1 a) |
| Ditto ditto ... | In Nagri | 3 p. (1 a) |
| Act XV of 1864 (Indian Tolls), as modified up to 30th June, 1909 . | In Urdu | 3 p (1 a) |
| Ditto ditto ... | In Nagri | 3 p. (1 a) |
| Act X of 1865 (Succession), as modified up to 1st April, 1909 ... | In Urdu. | 11 a 3 p. (2 a) |
| Ditto ditto ... | In Nagri | 11 a 3 p. (2 a) |
| Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August, 1908 ... ... ... .. .. ... | In Urdu. | 6 p (1 a) |
| Ditto ditto ... | In Nagri. | 6 p (1 a) |
| Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907 .. .. ... .. .. | In Urdu | 1 a 3 p (1 a) |
| Ditto ditto ... | In Nagri | 1 a 3 p (1 a) |
| Act V of 1870 (Unclaimed Deposits), as modified up to 1st October, 1908 ... ... ... ... ... ... | In Nagri | 3 p. (1 a) |
| Act VII of 1870 (Court fees), as modified up to 1st February, 1909 ... | In Urdu | 5 a 9 p (1 a) |
| Ditto ditto ... | In Nagri | 5 a 6 p (1 a) |
| Act XXVII of 1871 (Criminal Tribes), as modified up to 1st September, 1909 ... ... ... ... ... ... | In Urdu. | 1 a 3 p (1 a) |
| Ditto ditto ... | In Nagri. | 1 a 3 p (1 a) |
| Act I of 1872 (Evidence), as modified up to 1st May, 1908 ... ... | In Urdu. | 8 a. (2 a) |
| Ditto ditto ... | In Nagri. | 8 a (2 a) |
| Act I of 1878 (Opium), as modified up to 1st October, 1907 ... | In Urdu | 1 a 6 p (1 a) |
| Ditto ditto .. | In Nagri | 1 a 6 p (1 a) |
| Act XII of 1880 (Kazis) with footnotes ... ... ... | In Urdu. | 3 p. (1 a) |
| Act II of 1882 (Trusts) as modified up to 1st June, 1907 ... ... | In Nagri. | 3 a 6 p. (1 a) |
| Act XIII of 1889 (Cantonments), as modified up to 1st October, 1907 ... ... .. ... ... ... | In Urdu. | 3 a. (1 a 6 p) |

# FULL BENCH

1910
April 9

*Before Mr Justice Sir George Knox Mr Justice Banerji and Mr Justice Richards*

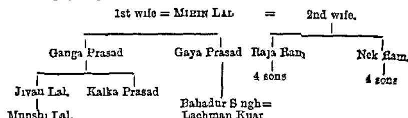
KESRI AND OTHERS (DEFENDANTS) v GANGA SAHAI (DEFENDANT) AND KALKA PRASAD AND ANOTHER (PLAINTIFFS) *

*Hindu Law—Mitakshara—Succession—Competition between uncle of the half blood and the son of an uncle of the whole blood*

*Held* that according to the Hindu law of the Mitakshara school an uncle of the half blood succeeds in preference to the son of an uncle of the whole blood the former being nearer in propinquity than the latter *Suba Singh* v *Sarafraz Kunwar* (1) distinguished

THE facts were briefly these —

The relationship between the parties appears from the following pedigree —




Bahadur Singh was the last male holder of the property in dispute After him his widow, Lachman Kunwar, remained in possession till her death At her death Raja Ram, Jivan Lal and Kalka Prasad were alive All of them claimed the property. Suits were brought by all of them and a decree was passed in favour of Kalka Prasad Raja Ram having died, his sons preferred an appeal

The Hon ble Pandit *Sundar Lal* (with him Pandit *[illegible] Kant Malaviya* for The Hon'ble Pandit *Madan Mohan Malaviya*), for the appellants —

It is settled law that a step mother is no heir under the Hindu Law The question is whether Raja Ram [illegible] Kalka Prasad and Jivan Lal. Under the Hindu Law [illegible] has a better title The question of the whole or [illegible] arises only when the claimants stand in the same [illegible]

* First Appeal No 57 of 1907 from a decree of [illegible] Judge of Farrukhabad dated the 10th of December [illegible]

(1) (1896) I L R 19 All, 215

## V—MISCELLANEOUS PUBLICATIONS

| | | | |
|---|---|---|---|
| Table showing Effect of Legislation in the Governor General's Council during 1906 | | | 3a 6p (1a.) |
| Ditto | ditto | during 1907 | 2a 6p. (1a.) |
| Ditto | ditto | during 1908 | 4a (1a) |
| Ditto | ditto | during 1909 | 3a 8p (1a) |

Annual Indexes to the Acts of the Governor General of India in Council for 1906, 1907, 1908 and 1909 The price is noted on them

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date Super royal 4to Annual subscription Rs 5 (Re 1) single issue 4a including postage

List of General Rules and Orders under Statutes and General Acts in force in British India Corrected up to 31st December 1908 — Rs 1-4-0 (3a.)

Addenda and Corrigenda List No 1 of 1909 to the List of General Rules and Orders — 3p (1a)

Ditto ditto No II of 1909 — 7a 6p (1a)

Chronological Tables of the Indian Statutes compiled under the orders of the Government of India by F G Wigley, of the Inner Temple Barrister at Law Edition 1909 — Rs 4 (6a)

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India 1901-03, with an Index of cases compiled under the orders of the Government of India by F G Wigley, of the Inner Temple, Bar at Law Edition 1906 Rs 10 Reduced to Rs 3 per copy — (10a)

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India, 1904, with an Index of cases compiled under the orders of the Government of India by C F Grey Bar-at Law Edition 1907 Re 1. 4a Reduced to Re 1 per copy — (6a)

Ditto ditto 1905 by C E Grey, Bar-at Law Edition 1907 Re 1 4 Reduced to Re 1 per copy — (6a.)

Ditto ditto 1906 by C E Grey Bar-at Law Edition 1908 Re 1-4. Reduced to Re 1 per copy — (6a)

Ditto ditto 1907, by B D Bose, Bar at Law Edition 1908 Re 1-4 Reduced to Re 1 per copy — (5a)

Ditto ditto 1908 by C E. Grey, Bar-at Law Edition 1910 — Rs 2 (6a)

Set of Digests from 1901—1907 Reduced to Rs 7 per set of 5 volumes) — (Rs 2)

General Rules and Orders made under enactments in force in British India consisting of General Rules Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index In three Volumes Rs 15 Reduced to Rs 10 per set (Rs 2) or Rs 5 per Volume — (12a)

Volume IV in the Press

| | | | |
|---|---|---|---|
| Title page and Contents of the Acts passed by the Governor General of India in Council in the year 1907 | | | 1a. 6p (1a) |
| Ditto | ditto | 1908 | 6a 9p (1a) |
| Ditto | ditto | 1909 | 2a. 3p (1a) |

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents:—

The principle laid down in *Suba Singh* v *Sarafraz Kunwar*, (1) governs the case It has been rightly decided there that whole blood should have precedence over half blood. The Mitakshara is the supreme authority in these provinces, and the verses cited by the other side show that even where there is a difference of degree, the order of succession is the same. Most commentators admit that the distinction between the whole and the half blood applies to remote heirs as well as to near heirs. The distinction in section 4 is not exhaustive The various sections of the Mitakshara should not be construed in the manner suggested by the other side, *e g.* Chap. II, section IV, verses 5 and 6. Every relationship mentioned here refers to relationship of the whole blood After the brother the line of succession is considered in pl. 7, and the brother there referred to is a brother of the whole blood The question is what the word 'brother' means there If 'uncles' in section 5, pl 4, means uncles of both classes, can it be said that an uncle of the half blood ranks equally with one of the whole blood ? The author of the Mitakshara has dealt with the case of brothers of the whole and half blood in pl 5 and left the principle to be applied elsewhere. There is no direct authority bearing on the point but the text of the Mitakshara as interpreted in I. L. R, 19 All, p 215, shows that such would be the case. The rule of propinquity lays stress on the nearness of the son to the mother. We have to see how far there is community of particles of blood between the deceased and the claimants. In the case of Raja Ram there is no community of particles through the mother between him and Bahadur Singh. The Full Bench Ruling in I L R, 19 All, 215, lays down that proposition and it supports the case of the plaintiffs respondents.

The Hon'ble Pandit *Sundar Lal* was not heard in reply.

BANERJI, J.—The suit out of which this appeal and the connected appeal No. 58 of 1907 arise relates to certain property left by one Bahadur Singh The plaintiffs in each case claim to

(1) (1896) I. L R, 19 All, 215.

descent from a common ancestor those who are descended from the same mother as the propositus are nearer in propinquity than those descended from a different mother" (see p 232), and that the distinction of whole blood and half blood is not confined to the brother and his sons but extends further. The question which we have to determine in this appeal is whether, when there is a difference in the degree of relationship, the rule of whole blood and half blood applies

The order of succession after parents is thus laid down in the Mitakshara —"On failure of the father, brethren share the estate" (Chapter II, s 4, § 1)

"Among brothers, such as are of the whole blood take the inheritance in the first instance under the text [of Manu] 'To the nearest sapinda, the inheritance next belongs,' since those of the half blood are remote through the difference of mothers" § 5)

"On failure of brothers also, their sons share the heritage" (Section 7)

"In case of competition between brothers and nephews, the nephews have no title to the succession for their right of inheritance is declared to be on failure of brothers" (§ 8)

This rule of exclusion of nephews by brothers also applies to brothers of the half blood, and sons of brothers of the full blood inherit on failure of half brothers (See West and Buhlers' Hindu Law, p 112, and Mayne's Hindu Law, section 569, p 774, 7th edn) Except in Bombay, where the authority of Vyavahar Mayukha is supreme, this rule applies to all cases governed by the Mitakshara

In section 5, chapter II of the Mitakshara the rule of succession in default of brothers' sons is laid down, the heirs being *gotraja sapindas* and after them *bhinna gotra sapindas* or *bandhus* Among the former "the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons" (Section 5, § 4) The word in the original Sanskrit which has been translated as 'successively" is *kramena*, which means one after another Among *gotraja sapindas*, therefore, the paternal grandmother takes first, after her, the paternal grandfather, after him, uncles, that is, the paternal grandfather's sons, and, in default of

BY THE COURT.—The appeal is allowed, the decree of the court below is set aside, and the suit of the plaintiffs dismissed with costs.

*Appeal decreed.*

## APPELLATE CIVIL.

*Before Mr. Justice Richards and Mr. Justice Tudball.*

NATHU MAL (OPPOSITE PARTY) *v.* THE DISTRICT JUDGE OF BENARES (PETITIONER)*

*Act No. III of 1907—(Provincial Insolvency Act), section 43 (2)—Insolvency—Inquiry as to alleged fraudulent acts committed by debtor—Procedure—Evidence*

*Held* that proceedings under section 43 (2) of the Provincial Insolvency Act, 1907, should not be based merely upon the evidence given on behalf of the creditors when opposing the debtor's application to be adjudged an insolvent, but evidence as to the specific acts alleged against the debtor should be recorded *de novo* *In the matter of Rash Behari Roy* (1) referred to

THE facts of this case were as follows:—

The appellant, Nathu Mal, made an application on the 21st of September, 1908, to be adjudged an insolvent. The application was, owing to some formal defects, returned to him on the next day. A fresh application was thereafter made on 21st January, 1901. In disposing of this application the Judge* found that it was clearly proved that the applicant had been guilty of very bad faith; that he had in his second application suppressed assets shown in the first application; and that he had, shortly before the second application, fraudulently disposed of valuable movable property to certain alleged creditors. The Judge however made, on the 11th of March 1909, the order of adjudication prayed for and appointed a receiver. The receiver called upon the insolvent to produce his account books; he did not do so, although in his deposition he had admitted keeping regular account books, but produced only "a sort of memorandum book" instead. The receiver reported the matter to the Judge, who commenced proceedings under section 43 (2) of the Provincial Insolvency Act (III of 1907). He framed four charges or counts against the

* First Appeal No 114 of 1909 from an order of E. H. Ashworth, District Judge of Benares, dated the 2nd of September, 1909

(1) (1889) I. L. R., 17 Calc., 209.

RICHARDS and TUDBALL JJ —Nathu Mal, appellant here, applied under section 16 of Act III of 1907 for an order of adjudication of insolvency The learned District Judge made the order applied for notwithstanding very strenuous objections on the part of the creditors The learned Judge says in his judgement of the 11th March, 1909 —"I therefore hold that there are no sufficient grounds for refusing an order of adjudication" The next sentence proceeds as follows —"At the same time I must place here on record that it is clearly proved that the applicant is guilty of very bad faith" He then proceeds to set forth the facts which show that the applicant was fraudulently concealing documents which would throw light on the state of his assets and was also fraudulently understating the amount of his assets We wish to clearly express our opinion that the learned Judge, holding the opinion he did was clearly wrong in granting the petition of Nathu Mal and declaring him insolvent Section 15 of Act III of 1907 provides, amongst other things, that if the Court is of opinion for any sufficient reason that the order of adjudication should not be made the Court should dismiss the petition In our opinion the facts set forth in the order of the learned Judge to which we have just referred were ample grounds for dismissing the petition, and the petition under the circumstances ought to have been dismissed After the order of adjudication a receiver was appointed and he reported to the learned Judge that the insolvent had not produced his books This led to proceedings under section 43, clause (2) The learned Judge framed what we may call four charges In the order appealed from he deals with these charges and he sentenced the insolvent to six weeks' simple imprisonment This is the order appealed against The main ground of appeal argued here is that the sentence is based mainly on the evidence that was given on behalf of the creditors when they were opposing the application for adjudication The appellant contends that when the Judge framed charges against him he ought to have taken the evidence on each of the charges *de novo* Reliance is placed on a ruling—*In the matter of Rash Behari Roy an insolvent* (1) In that case it was held that the provisions of the XI and XII Vict, Cap 21, section 50, were in

(1) (1889) I. L. R., 17 Calc., 209.

*Before Mr. Justice Richards and Mr. Justice Tudball.*

ALI BAKHSH AND ANOTHER (PLAINTIFFS) v. ALLAHDAD KHAN AND OTHERS (DEFENDANTS.)*

*Muhammadan law—Dower—Right of widow to remain in possession of property of her husband Such right heritable.*

The right of a Muhammadan widow who has entered into possession of her husband's property peacefully and without fraud in lieu of her dower debt is a heritable right and her heirs are entitled to remain in possession until the debt is satisfied. *Aziz-ul-lah Khan* v. *Ahmad Ali Khan* (1) followed. *Amanat-un nissa*, v *Bashir un-nissa* (2) doubted *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (3), *Mahomed Usmud-ool-lah Khan* v. *Mussumat Ghasheea Beebee* (4), *Mussumat Kummur-ool nissa Begum* v. *Mahomed Hussun* (5), *Mussamut Wahid un nissa* v. *Mussamut Shubrattun* (6), *Ahmed Hossein* v. *Mussamut Khodeja* (7), *Syud Bazayet Hossein* v *Dooli Chund* (8), *Ali Muhammad Khan* v. *Aziz ullah Khan* (9), *Ajubi Begam* v *Nasir Ahmad* (10), *Hadi Ali* v. *Akbar Ali* (11) and *Muzaffar Ali Khan* v. *Parbati* (12) referred to

THE facts of this case were as follows:—

One Izzat-ul lah, the owner of certain immovable property, died leaving him surviving a widow to whom dower was due. The widow got into possession in lieu of her dower, and after her death her heirs, the plaintiffs, took possession and had their names recorded in the revenue papers The defendants, the heirs of the husband, objected, and the plaintiffs brought the present suit for a declaration that their possession, as heirs of the widow, was lawful and could not be disturbed till the dower debt was satisfied.

The lower courts dismissed the suit on the ground that the right of the widow to remain in possession was merely personal and that her heirs could not claim to remain in possession.

The plaintiffs appealed.

Maulvi *Muhammad Ishaq*, for the appellant:—

Under the Muhammadan law, the debts of a deceased Muhammadan take precedence over all other claims and must be paid first. A dower debt stood on the same footing as any other debt.

* Second Appeal No 211 of 1909, from a decree of Louis Stuart, District Judge of Meerut, dated the 16th of December 1908, confirming a decree of Soti Raghubans Lal, Subordinate Judge of Meerut, dated the 24th of November, 1908.

(1) (1885) I. L. R, 7 All., 353.
(2) (1894) I. L R, 17 All, 77.
(3) (1871) 14 Moo I A, 377
(4) (1866) 1 Agra, 150
(5) (1866) 1 Agra, 287.
(6) (1870) B. L. R, 54.
(7) (1868) 10 W. R, C. R., 369.
(8) (1878) L R., 5 I. A., 211.
(9) (1883) I. L R, 6 All., 50.
(10) Weekly Notes, 1890, p. 115.
(11) (1898) I. L. R, 20 All., 262.
(12) (1907) I. L. R, 29 All, 640.

debt, are entitled to continue holding that estate after her death, until the dower debt has been discharged

The present plaintiffs appellants are the heirs of one Musammat Zahuran This lady and Musammat Saliman were the wives of one Izzat Khan or Izzat ullah, who died on August 29th, 1905, leaving as his heirs the two widows (who as heirs were entitled to a one eighth share each) and one Allahdad Khan (who was entitled to six eighths) On his death the widows each took possession of a half share

Musammat Zahuran died in December, 1906, and the present plaintiffs, as her heirs applied for mutation of names They were opposed by Allahdad Khan but defeated him in the Revenue Court He then transferred his rights, as heir, to defendants 2 to 4, and so the plaintiffs have now sued for a declaration of their right to possession of the three-eighths share in the estate of Izzat Khan of which the widow had taken possession (over and above the one eighth share which she took as heir) until the satisfaction of the dower debt due to her

Amongst other defences it was pleaded that the widow had not obtained possession lawfully and that the dower debt was only Rs 200 and not Rs 2,000, but the lower courts have not gone into the merits of the case On the strength of the rulings in *Hadi Ali* v *Akbar Ali* (1) and *Muzaffar Ali Khan* v *Parbati*, (2) they have held that even where a Muhammadan widow has lawfully obtained possession in lieu of dower, her right to that possession is purely a personal right and is neither heritable nor transferable and therefore the present plaintiffs, even on the facts as alleged by them are not entitled to retain possession of the three eighths share of Izzat Khan's estate The correctness of this decision and of the above mentioned rulings is questioned on appeal It is conceded by both parties that the dower debt stands in no better position than that of any other unsecured debt of the deceased husband It is further conceded that if she lawfully obtains possession of that estate in lieu of her dower debt, the widow is entitled, as against the other heirs of her deceased husband, to hold it until the dower debt has been discharged, either from the usufruct or by payment on the part of

(1) (1898) I. L. R., 20 All., 262. (2) (1907) I. L. R., 29 All., 640.

widow had alienated was not her debt with its security but the property itself, and that as to the rights of the other heirs it is clearly laid down that they are entitled to recover possession *only on payment during her lifetime or on her death,*

In the case of *Mussumat Kummur ool nissa Begum* v *Mahomed Hussun* (1) it was held that the widow was not competent to alienate permanently more than her own one eighth share *obtained by inheritance As to the balance of the estate* the learned Judges remarked —" She holds it as security for the payment of her dower * * * At the same time we are satisfied that as the property in suit formed a portion of Umda Begam's husband's estate, the whole of which was in her possession as security for her dower the widow would have had power to mortgage such hypothecated interest and that during her lifetime the defendant, except by payment of the dower, could not have released the mortgage '

The above two decisions are of 1866 and go to show that the widow s security for her dower is transferable though she has not the power to transfer the actual property

In the year 1870 in the case of *Mussumat Wahid un nissa* v *Mussumat Shubrattun* (2) it was held that ' under Muhammadan law there is no hypothecation without seisin, but a creditor, *whether widow or any other* if in possession of the husband's property with the consent of the debtor or his heirs might hold over until the debt is paid ' and that the cases cited to show that the widow had a right to hold until her dower was paid off, proceeded on this principle This was held on the basis of a doctrine quoted from Macnaghten's Muhammadan Law

In the case of *Mussumat Bebee Bachun* v *Sheikh Hamid Hossein* (3), a decision of 1871, their Lordships of the Privy Council remarked — ' It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term although, no doubt, the right is so stated in the judgement of the High Court in the case of *Ahmed Hossein* v *Mussamut Khodeja* (4) Whatever the right may be called, it appears to be founded on the power of the widow, "*as a creditor for her*

(1) (1866) 1 Agra 297 (3) (1871) 14 Moo I A 377
(2) (1870) 6 B L R 54 (4) (1868) 10 W R, C R, 369.

remarks:—"But this is something *short* of her having an actual lien upon it, and we are unaware that their Lordships of the Privy Council have ever made any such declaration. Indeed in *Bazayet Hossein* v. *Dooli Chund* it was ruled that the creditor of a deceased Muhammadan, whether in respect of dower or otherwise, cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir at law whether by sale or mortgage."

In this case the widow had transferred the very estate of her husband. She had not transferred her dower debt and with it the security that she held. The dower debt was her own personal property and by selling her husband's property she did not thereby transfer her right to the dower debt. Therefore it was correctly held that her alienee could not plead as against the heirs who sued for possession that the dower debt was still unpaid. The decision on the facts was correct. It might have been otherwise had the widow only sold the dower debt together with her security for the same. In the case of *Bazayet Hossein* v. *Dooli Chund*, the widow was not in possession of the estate at all. The son of the deceased as heir took possession and transferred to others Subsequently the suit for dower was brought and a decree obtained, and it was sought to charge the estate in the hands of a *bonâ fide* transferee. This clearly could not be allowed. The right to dower is no doubt the personal property of the widow and ordinarily stands on the same footing as any other unsecured debt, but this decision is no satisfactory authority against the widow's right to retain possession once it has been lawfully obtained as security for her dower.

The decision must be read in the light of the facts of the case, and it merely amounted to this that the widow had no power to alienate the estate itself The case was mentioned and the ruling followed in *Ajuba Begam* v. *Nazir Ahmad* (1) by Mr. Justice MAHMOOD Here the widow was not in possession of the half house in lieu of dower. She made an out and out transfer of an isolated portion of her husband's estate, and it was ruled that she could only convey her rights and interests by inheritance from

(1) Weekly Notes, 1890, p. 115.

The Hon'ble Pandit *Sundar Lal* and The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

RICHARDS and TUDBALL, JJ. :—The suit out of which this appeal arises was brought to recover joint possession of a certain temple of the Ballavacharya Gosain sect, in which the images of Balkrishna are placed, together with a grove and the movable property, ornaments and other articles appurtenant thereto. The plaintiffs are the sons of one Ganga Betiji, a daughter of one Goswami Muttuji Maharaj. The original defendants were Anrudh Lala and Madhsudan Lala, the sons of one Gurdhana Betiji (another daughter of the said Goswami Muttuji Maharaj) and Damodar Lala, the husband of Gurdhana Betiji. When the suit was first instituted, the plaintiffs merely claimed joint possession with Anrudh Lala and Madhsudan Lala. Whilst the suit was pending, Anrudh Lala died unmarried, leaving his father Damodar Lala as his representative. Again, pending the suit, Tikait Gordhan Lalji, who is now the principal defendant and respondent, brought a suit against Anrudh Lala and Madhsudan Lala, claiming that, under the custom observed by the sect, he was entitled to possession of the temple and other property. That suit was referred to arbitration, and the arbitrators decided in favour of Tikait Gordhan Lalji and the custom set up. Gordhan Lalji was thereupon by an order of the court, dated the 25th August, 1905, made defendant to the present suit. Apparently by an oversight the plaint was not amended in the lower court, though the plaintiffs deny *in toto* the defendant's right to possession. The proper issues, however, were framed and the parties went to evidence thereon, and we have therefore allowed the plaint to be amended by adding a prayer for his ejectment.

He, Gordhan Lalji, (as also did Goswami Muttuji Maharaj) belongs to a sect called the Ballavacharya Gosains. This sect originated over four hundred years ago. It was established by a man of the name of Ballav, son of Lachman Bhat; the doctrine which he originated was opposed to that of the celibate Gosains. He held that the ideal life consisted rather in social enjoyment than in solitude and mortification, and, contrary to the ordinary rule of the celibates, he married and had two sons, Gopi Nath and

ALI
AL

of gift or otherwise and the gift was not legally valid Having been put into possession in lieu of dower she was entitled to continue in possession so long as her dower debt remained unpaid *that was a right personal to her and became extinct on her death* Hadi Ali is not entitled to remain in possession of the estate left by Karim Bakhsh"

Now in so far as the Court held that the widow had no power to gift the actual property to Hadi Ali, the decision in my opinion was perfectly correct The property did not belong to the widow She merely held it as security for her dower debt and therefore could not give "*it*," the property, to her grandson The case was similar in its aspects to that of *Ali Muhammadd Khan* v *Aziz ullah Khan* and also *Ajuba Begam* v *Nazir Ahmad* mentioned above, in the latter of which Mr Justice MAHMOOD pointed out that these decisions were not inconsistent with his decision reported in I L R, 7 All, 353, wherein he held that the widow's right to retain possession, lawfully obtained, was heritable But I cannot agree with the reasoning of the learned Judge when he says that the widow's right to continue in possession was a right *personal* to herself and became extinct on her death

On Letters Patent Appeal this decision was upheld, reliance being placed on the two rulings mention above (I L R, 6 All, 50 and Weekly Notes, 1890, p 115) and it was held that the widow's lien was a purely personal one and became extinct on her death not surviving to her heirs The judgement is very brief No reason whatever is given for holding that the widow's right to continue in possession became extinct on her death and did not survive to her heirs Though reliance is placed on Mr Justice MAHMOOD's decision in *Ajuba Begam* v *Nazir Ahmad*, no mention is made either of his ruling in I L R, 7 All, 353, nor of the clear distinction which he draws in his judgement between the circumstances of the case then before him and those of the case reported in I L R, 7 All, 353 With due deference to the learned Judges I cannot see that he held that the widow had a lien which did not survive to her heirs

Moreover in this case it was not even necessary to go so far as this in order to decide the case. Hadi Ali was the donee, not of

The Hon'ble Pandit *Sundar Lal* and The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

RICHARDS and TUDBALL, JJ. :—The suit out of which this appeal arises was brought to recover joint possession of a certain temple of the Ballavacharya Gosain sect, in which the images of Balkrishna are placed, together with a grove and the movable property, ornaments and other articles appurtenant thereto. The plaintiffs are the sons of one Ganga Betiji, a daughter of one Goswami Muttuji Maharaj. The original defendants were Anrudh Lala and Madhsudan Lala, the sons of one Gurdhana Betiji (another daughter of the said Goswami Muttuji Maharaj) and Damodar Lala, the husband of Gurdhana *Betiji*. When the suit was first instituted, the plaintiffs merely claimed joint possession with Anrudh Lala and Madhsudan Lala. Whilst the *suit* was pending, Anrudh Lala died unmarried, leaving his father Damodar Lala as his representative. Again, pending the suit, Tikait Gordhan Lalji, who is now the *principal defendant* and respondent, brought a suit *against Anrudh Lala and* Madhsudan Lala, claiming that, under the custom observed by the sect, he was entitled to possession of the temple and other property. That suit was referred to arbitration, and the arbitrators decided in favour of Tikait Gordhan Lalji and the custom set up. Gordhan Lalji was thereupon by an order of the court, dated the 25th August, 1905, made defendant to the present suit. Apparently by an oversight the plaint was not amended in the lower court, though the plaintiffs deny *in toto* this defendant's right to possession. The proper issues, however, were framed and the parties went to evidence thereon, and we have therefore allowed the plaint to be amended by adding a prayer for his ejectment.

He, Gordhan Lalji, (as also did Goswami Muttuji Maharaj) belongs to a sect called the Ballavacharya Gosains. This sect originated over four hundred years ago. It was established by a man of the name of Ballav, son of Lachman Bhat; the doctrine which he originated was opposed to that of the celibate Gosains. He held that the ideal life consisted rather in social enjoyment than in solitude and mortification, and, contrary to the ordinary rule of the celibates, he married and had two sons, Gopi Nath and

in possession is restricted to the widow personally and that it ceased with her existence The right is one which the widow secures *as a creditor* for her dower and it is one to continue holding until her debt is satisfied Such a right is property, and *primâ facie* in the absence of any law or contract to the contrary, it is property which is both heritable and transferable. The older rulings quoted above all tend one way, viz, that the widow holds the property in such circumstances, as security for her debt and that she has a lien upon it, and that her right to continue in possession is a transferable interest (*vide* 1 Agra, 150 and 288) In the former of these two cases it was laid down that in order to obtain possession the heirs must pay the dower debt either "during her lifetime or *on her death*" Her position, it has been held, is analogous to that of a mortgagee or a pawnee No text, no rule of law, Muhammadan, English or Indian, has been placed before us to support the contention that this right dies with the widow and that she has no power to transfer both her dower debt and its security This right must not be confounded with a right to sell the actual property which has often been claimed and as often disallowed. Thus once lawfully admitted to possession hers is a lien subject, however, to a liability to account for the profits I know of no valid reason in law why she should not be entitled to transfer her debt together with this right to continue in possession Equally, there is no justice in holding, in the absence of contract to the contrary, that her heirs, who inherit the dower debt, do not also inherit with it the security for that debt It is easy to conceive a case in which a widow has held such possession for many years over and above the period of limitation within which she must sue for her dower debt, and has then died without the debt being fully discharged If the heirs are not entitled to inherit they lose all means of recovering the balance of the debt due Only in very special circumstances could section 20 of the Limitation Act assist them Of course, if the widow agrees with her husband's other heirs to hold the property only for her lifetime in full satisfaction of the debt, the latter is extinguished on her death. In the absence of any such contract, in my opinion, the widow's heirs are entitled to inherit the right to continue in possession until her dower debt is satisfied,

permission Dauji was the grandfather of Girdhar Lalji (see pedigree at page 68R) Both of them were Tikaits, that is to say, they were the eldest male descendants in a line from one of the seven sons of Bithal Nath The documentary evidence on the subject is exhibit A, which is a letter said to have been written by Muttuji to Girdhar Lalji A translation of the letter is to be found at page 75R Dauji and Girdhar Lalji were both Tikait Gosains, holding in succession a Tikait temple, and the defendant is the eldest son and successor to Girdhar Lalji The plaintiffs claimed the property in the first instance as being their personal property by inheritance from Muttuji, it was never alleged that they or Muttuji were the dedicators of the grant temple or idol, and we are satisfied that such a claim could never successfully have been made The court below has found, and the finding has been accepted in this court orally by Mr *Chaudhri* (who thereby abandoned pleas Nos 3 and 13 in the memorandum of appeal), that the property was "*debutter*" or "*waqf*," and the real question which was argued in appeal has been whether or not the plaintiffs are entitled along with the sons of the other daughter of Muttuji to succeed to the management of the temple and the temple property Mr *Chaudhri* claimed that either Muttuji or his father dedicated the property to the deity, and as no scheme of management by the dedicator has been proved the right of superintendence and management vests in the legal heirs of Muttuji A large volume of evidence was given in the court below on both sides The plaintiffs contend that unless the defendant Tikait Gordhan Lalji successfully proved a legal custom excluding daughter's sons, they as the heirs of Muttuji (according to the ordinary Hindu Law of inheritance in respect of private property), were entitled to succeed to the management of the temple The court below has found upon the evidence that the defendant did prove the existence of a custom amongst the Ballavacharya Gosain sect excluding daughter's sons, and that the plaintiffs had failed to prove that daughter's sons inherited the management of Ballavacharya Gosains' temples The contention in appeal before us was that the defendant had entirely failed to prove such a custom and that the evidence adduced on behalf of the plaintiffs demonstrated that, [illegible]

the lower appellate court to the court of first instance for decision on the merits Costs here and hitherto will be costs in the cause

*Appeal decreed.*

---

*Before Mr Justice Richards and Mr Justice Tudball*

RAMZAN ALI KHAN (PLAINTIFF) *v* ASGHARI BEGAM (DEFENDANT) AND RUSTAM KHAN (PLAINTIFF) *

*Muhammadan law—Dower—Rights of widow in possession in lieu of dower—Proof of consent of husband or heirs not necessary*

A Muhammadan widow to whom dower is due who enters into possession of her husband s property on his death is entitled to hold the estate against the other heirs until her claim to dower is satisfied subject to her liability to account for the profits which she may receive while so in possession. It is not necessary for her to show that the deceased husband or his heirs consented to her getting into possession *Amanat un nissa* v *Bashir un nissa* (1) dissented from *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (2) *Ameer-oon nissa* v *Moorad oon nissa* (3) and *Amani Begam* v *Muhammad Karim ullah* (4) referred to

THE facts of this case were as follows —

The plaintiff sued as one of the heirs of one Gulsher Khan to recover his share of the estate, which was in the possession of the widow of Gulsher Khan, the defendant Musammat Asghari Begam She resisted the suit upon the ground that her dower debt was unpaid and that she was therefore entitled to remain in possession until it was satisfied The lower appellate court found that the defendant's dower was Rs 5,000 and was still undischarged It consequently gave the plaintiff a decree conditional upon his paying the sum of Rs 5,000 The plaintiff appealed, urging that the widow was not lawfully in possession, and that therefore he was entitled to a decree without paying off her dower debt

Babu *Benoy Kumar Mukerji*, for the appellant

Babu *Jogindro Nath Chaudhri*, for the respondents

RICHARDS —This appeal arises out of a suit brought by the plaintiff as one of the heirs of Gulsher Khan for his share of the

---

* Second Appeal No 599 of 1909 from a decree of H J Bell District Judge of Aligarh dated the 25th of February 1909 confirming a decree of Muhammad Shafi Subordinate Judge of Aligarh dated the 11th of May 1908

(1) (1894) I L R 17 All 77
(2) (1871) 14 Moo I A, 377.
(3) (1855) 6 Moo I A., 211
(4) (1894) I L R., 16 All., 225.

appeal to their Lordships of the Privy Council arose raised also a question of succession between rival claimants to the *shebaitship*. At page 38 of the volume their Lordships further say :—"There is, no doubt, considerable difficulty in ascertaining what is the rule of succession to this office, but it is certain that the usage had not been according to the ordinary rules of inheritance under Hindu law. Not only does the usage not support the plaintiff's claim, but it is opposed to it. It is not for their Lordships to consider whether there is any infirmity in the title of the respondent Gopal, who has been in possession many years, with the consent (if not by appointment) of the Rajah."

In the present case it was never alleged, much less proved, that Muttuji dedicated any property; on the contrary, Damodarji, the ancestor of the defendant, was the recorded zamindar of the grove and the site of the temple. Probably the property belonged to the Tikait temple of which Damodarji was the manager, and if, as alleged by a witness, the first idol was presented to Muttuji, it was probably one of the smaller idols, which had been "sitting in the lap" of the larger idol in the Tikait temple. We think under the circumstances of the present case that the onus did not lie on the defendant Gordhan Lalji to prove a universal custom excluding the daughter's sons. The evidence in the case establishes one or two matters beyond all doubt. We may mention in the first place that it has been admitted at the bar in the clearest possible manner that in the case of Tikait temples, that is, of the principal temples of the sect, the ordinary rule of Hindu Law as to inheritance does not apply, and that on the contrary the succession invariably goes by the rule of lineal primogeniture and that daughters and daughter's sons are always excluded. It is also demonstrated by evidence that there are portions of the worship in a Ballavacharya Gosain temple which cannot be performed by any person other than a Ballavacharya Gosain. The plaintiff's own witness, Goswami Deokinandan Acharya, says, at page 1A :—"*In some cases* the daughter's son does inherit his maternal grandfather's property. We, Acharyas, have a large following of disciples at different places where the disciples would object to have any body as their Acharya unless he belonged to the Ballav Kul, and

widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed with the consent of the heirs on his death to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession, adversely to the other heirs, of property to the possession of which they and she in respect of her share in the inheritance are entitled" The appellant contends that inasmuch as it is not shown in the present case that the widow had been placed in possession either by her husband in his lifetime, or by the heirs after his death, he has no right to retain possession, even though her dower debt remains undischarged With all due respect to the learned Judges who decided the case to which I have just referred I do not think that the proper regard was paid to the facts in the case of *Mussumat Bebee Bachun* v *Sheikh Hamid Hossein* It appears from the report of that case (at page 382) that the widow had got mutation of names in spite of the opposition of the other heirs, and (at the top of page 382, 14 Moore's I A ) their Lordships of the Privy Council say that there was no agreement on the part of the husband to pledge his estate for the dower Accordingly, in my opinion, it is not correct to say that unless a Muhammadan widow has obtained possession either by contract with her husband or with the consent of the heirs, she cannot be lawfully in possession so as to give her a right to retain possession until her dower debt is paid It seems to me that if the widow obtains possession peacefully and quietly and without fraud, she is entitled to remain in possession until her dower debt is discharged, subject to her liability to account for the profits that she has received whilst so in possession In my opinion this is the law as laid down by their Lordships in the case to which I have just referred .

In the case of *Amani Begam* v *Muhammad Karim ullah Khan* (1) a learned Judge of this court points out that the possession of the widow entitled her to remain in possession pending the payment of her dower, does not depend upon the consent of the co-heirs At page 227 the learned Judge says —" I can find

(1) (1894) I L R., 16 All., 225

governed by the Hindu Law, and that it is only in cases more or less rare that a daughter's son has been allowed to succeed to a Gosain temple, and the result of so succeeding has been to cause the temple to cease to be a Ballavacharya Gosain temple Again, Gopal Lalji, another Ballavacharya Gosain witness examined on behalf of the plaintiffs, admits (vide A 14) that succession of a daughter's son is by no means universal, is rather rare, and there is at least a part of the office of a Ballavacharya Gosain which cannot be performed by a Bhat There is undisputed evidence, (see pp 6, 15 A, plaintiffs' own witnesses), that in two cases daughters of Ballavacharya Gosains nominated Ballavacharya Gosains to their Ballavacharya Gosain temples, passing over their own sons who were Bhats. This, if the ordinary Hindu Law had prevailed, they would have no power to do, and the fact that they did do so is a strong ground for believing that it is unusual and improper that a Bhat should succeed to the management and superintendence of a Ballavacharya Gosain temple. It seems to us that it would be improper for the Court to establish on the *gaddi* persons who on the admission of the plaintiffs' own witnesses could not properly perform the office, and whose presence as *shebaits* would degrade or at least lessen the importance of the temple We are also of opinion that the plaintiffs' own evidence and the admission at the bar as to Tikait temples demonstrate that the ordinary Hindu Law of inheritance does not apply to the succession in the case of the *shebaitship* of these temples, and that the onus lay on the plaintiffs of showing that they were the persons entitled to the office under the customary law of the sect. It is unnecessary for us to go so far as to hold with the learned Judge that the defendant proved by evidence a universal custom as to the exclusion of the daughter's son. We have not thought it necessary to deal at length with the evidence adduced by him. It has been fully dealt with by the court below. In our opinion the defendant's evidence, corroborated as it is by the plaintiffs' evidence already referred to, proves clearly that, whatever may be the custom or usage in this sect in regard to succession to the management of temples, the ordinary rule of inheritance under Hindu Law does not prevail We have now to see whether the plaintiffs' evidence establishes any custom or usage under

out of the proceeds This rule of Muhammadan law, no doubt, has been modified and is not applicable in the present age, but the widow's right to retain possession of her husband's estate in lieu of her dower has sprung from this and is therefore not dependent on the consent of her co-heirs

1910

RAMZAN ALI KHAN v. ASGHARI BEGAM

BY THE COURT.—The order of the Court is that the appeal will be dismissed with costs

*Appeal dismissed*

---

*Before Mr Justice Richards and Mr Justice Tudball*

1910 *April 29*

TAFAZZUL HUSAIN (PLAINTIFF) v. THAN SINGH AND ANOTHER (DEFENDANTS).*

*Pre-emption—Muhammadan law—Partition after sale but before decree—Effect on suit*

The plaintiff sued for pre-emption of zamindari property basing his claim upon the Muhammadan law and the fact that he was a co-sharer in the property sold. After the suit but before decree, the property was partitioned and the plaintiff and the vendors became owners of different *mahals* *Held* that the plaintiff was no longer after the partition had been completed entitled to a decree for pre-emption

THE facts of this case were as follows —

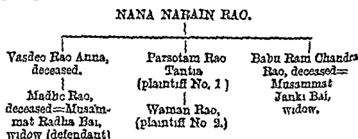
The suit was one for pre-emption—based on the Muhammadan law—of zamindari property At the date of the sale sought to be pre-empted, the plaintiff pre-emptor and the vendor were both co-sharers in the village (mauza Kherua, pargana Jahanabad, district Pilibhit), and the plaintiff had a right of pre-emption as against the vendee Some time after the institution of the suit for pre-emption by the plaintiff he and other co-sharers applied for perfect partition of the village to the Revenue Court against the vendee as opposite party This application was subsequently withdrawn; and then the vendee and other co-sharers, except the plaintiff applied for perfect partition and it was made and came into force before the pre-emption suit proceeded to a decree As a result of the partition the plaintiff and the vendor became owners of different *mahals* The Subordinate Judge dismissed the plaintiff's suit on the ground that by reason of the partition the plaintiff was no longer a co-sharer of the vendor within the

---

* Second Appeal No. 677 of 1909 from a decree of W. H. Webb, District Judge of Bareilly dated the 10th of May 1909, confirming a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 9th of July, 1907

THE facts of this case were as follows:—

The parties were related to each other as indicated by the subjoined pedigree:—




The defendant was the widow of *Madho Rao*, nephew of the plaintiff No. 1, and cousin of the plaintiff No 2. Madho Rao's name was during his lifetime *recorded* in the revenue papers in respect of the disputed shares in the 18 properties in question, and he was *lambardar* in respect of one of them. After his death the defendant applied to the Revenue Court for entry of her name in place of her husband. This application was opposed, but was finally decided by the Board of Revenue in her favour. The plaintiffs therefore instituted the present suit for a declaration that they are the owners and in possession of the disputed properties, basing their claim on the allegation that they and the deceased Madho Rao formed a joint Hindu family and therefore they became owners by survivorship The defendant pleaded, *inter alia*, that as regards the nature of the property and the possession of Madho Rao, the matter was *res judicata* and that the suit was barred by section 42 of the Specific Relief Act. The court below framed one issue.—"Is or is not the suit barred by section 42 of the Specific Relief Act?", and held that the suit was so barred, and without entering into the merits or other issues arising in the suit, dismissed it with costs. The plaintiffs thereupon appealed to the High Court.

Babu *Surendra Nath Sen* (with him Babu *Jogindro Nath Chaudhri*), for the appellants submitted that the court below had erred in holding that the suit was barred by section 42 of the Specific Relief Act The plaintiffs appellants were in possession of the property in dispute Long after the institution of the suit the defendant was *lambardar* of one of the villages. The oral evidence produced by the plaintiffs proved their possession, and

of pre emption should continue up to the moment of passing the decree If it were so, the right of pre emption could be easily thwarted, one of two co sharers might transfer to a stranger and thereafter partition off his share, and thereby defeat the other co sharer's right of pre emption And this method would then have been mentioned in the text books as one of the successful devices for circumventing pre-emption The conditions of pre emption are enumerated in Baillie's *Digest of Muhammadan Law,* pp 475-77 In the 6th condition it is not said that the *milk,* or ownership, in the mansion which exists at the time of the sale should continue up to the date of the decree Hamilton *Hedaya* (by Grady), Book XXXVIII, Ch IV p 561 *et seq* deals *exhaustively* with the cases where the right of pre emption having come into existence will be defeated by reason of other circumstances happening before the decree is passed There are no other cases in which the right having arisen would be defeated The present case does not come within chapter IV.

Mr *Abdul Raoof* (for Maulvi *Ghulam Mujtaba*) for the respondent —

Since the partition the plaintiff is not a partner in the *mahal* in which the property is situate At the date of the decree, therefore, he was not a sharer If the plaintiff's suit were to succeed, the result would be contrary to the object of pre-emption, for it would be introducing him within a *mahal* from which, as the result of the partition, he has been separated The original meaning of the word *shafa* is ' conjunction", Baillie, *Digest of Muhammadan Law,* page 475, Hamilton, *Hedaya* (by Grady), page 547 If the pre emptor is not a co sharer in the *mahal,* his land cannot be said to ' conjoin" that of the vendor. Hamilton, *Hedaya* page 548 lays down that "the right of *shafa* holds in a partner who has not divided off and taken separately his share" The plaintiff, having divided off, is no longer entitled to a decree for pre emption Hamilton, *Hedaya,* page 561, 562, lays down that one of the circumstances which invalidate the right of *shafa* is the death of the *shafi* before the Qazi's decree Thus, the continuance of the right of pre emption to the date of the decree is not only contemplated but expressly mentioned

The attention of the Court was drawn to paragraphs 5 and 7 of the plaint, which disclosed that the present suit was based upon a different title, which accrued since the decision of the suit now pleaded as a bar

[The argument was then adjourned ]

Babu *Jogindro Nath Chaudhri*, for the appellants, on a subsequent hearing, submitted that there was a document, dated the 31st January, 1905, which was a testamentary instrument and had the effect of investing Waman Rao with the right of ownership in the property belonging to Madho Rao It was immaterial whether the property was joint family property or otherwise The document in question was intended to create a right in favour of Waman Rao equal to extent to what would have accrued to him by rule of survivorship if the family were joint.

RICHARDS and TUDBALL, JJ —This appeal arises out of a suit brought by the plaintiffs for a declaration that they were the proprietors in possession of, and the defendant Musammat Radha Bai had no right to, the property in suit and that the said Musammat Radha Bai was not entitled to get her name entered in the revenue papers Musammat Radha Bai is the widow of Madho Rao, who was a nephew of the plaintiff Parsotam Rao A pedigree of the family, which is admitted to be correct, will be found at page 5 of the paper book One Nana Narain Rao made a will, under which he divided up his property between his sons The will contained a provision that it might be well for the family of Nana Narain Rao if, notwithstanding the division, it continued together The terms of the will gave rise to some litigation which was commenced about the year 1901 In that suit one Babu Ram Chandra Rao, one of the three sons of Nana Narain Rao, claimed a partition He claimed that if his father's will operated to divide the family, he was entitled to a partition by metes and bounds of the property bequeathed to him If, on the other hand, the family was joint and undivided, notwithstanding the will, he claimed usual partition of all the family property Parsotam Rao was a defendant to that suit, as also Madho Rao representing the third brother Madho Rao and Parsotam Rao pleaded that the family was separate. At that time they considered it best for their interests to plead separation, which would

[illegible] v. [illegible]

divided off and taken separately his share." Having regard to what has happened, the plaintiff's property has been divided off. He is no longer a partner with the vendor. It is argued that inasmuch as the plaintiff was a partner at the time of the institution of the suit, it therefore does not matter that a partition has since taken place, particularly if the plaintiff was not the person who sought partition. Evidently the plaintiff did feel that if he had prosecuted the partition, it would be fatal to his suit, and this perhaps explains why he withdrew from the application for partition which he himself made in the first instance. It is expressly laid down in the *Hedaya*, Chapter IV, Book 38, that it is a condition that the property of the *shafi* remain firm until the decree of the Qazi be passed, and for this reason if the *shafi* previous to the decree of the Qazi sell the house from which he derives his right of *shafa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated. Applying the same principle to the present case, plaintiff's right of *shafa* was founded upon the fact that he was a partner, that is to say, a co-sharer in the *mahal*. He has ceased to be such co-sharer. Therefore the reasons or grounds of his right had been extinguished before the decree of the court, and therefore the right itself is also extinguished. We dismiss the appeal with costs.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

1910 May 4.

*Before Mr. Justice Richards and Mr. Justice Tudball.*

EMPEROR v. MUHAMMAD YAKUB AND OTHERS.*

*Criminal Procedure Code, section 107—Security to keep the peace—Security demanded in respect of an act which was legal, although others might thereby have been led to break the peace.*

To justify an order under section 107 of the Criminal Procedure Code, the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquility or to do some *wrongful* act that may occasion a breach of the peace. The fact

*Criminal Revision No. 157 of 1910 from an order of Hanuman Singh, Magistrate of the first class of Ghazipur, dated the 12th of March, 1910.

in the present suit and Madho Rao, and as they were all arrayed on the defendants' side in the prior suit, the decision in that suit cannot operate as *res judicata*, and that the plaintiffs are now entitled to re open the entire question as between them selves and Radha Bai, the widow of Madho Rao The nature of a partition suit has been dealt with in a number of cases In the case of *Sheikh Khoorshed Hossein* v *Nubbee Fatima* (1) the learned Judges were of opinion that "a decree for partition is not like a decree for money or the delivery of specific property, which is only in favour of the plaintiff in the suit It is a joint decla ration of the rights of persons interested in the property of which partition is sought, and such a decree, when properly drawn up, is in favour of each share holder or set of share holders having a distinct share" This case was cited with approval by a Bench of this Court in the case of *Dost Muhammad Khan* v *Said Begam* (2) The remarks of the learned Judges will be found at page 87 of the Report They observe —"In a suit for partition (as the former suit was) the decree is or ought to be a joint decla ration of the rights of the persons interested in the property of which partition is sought, and is a decree in favour of each sharer It decides what interest each of the sharers has in the property, the subject of partition, whether those sharers be plaintiffs or defendants, and renders unnecessary any subsequent suit by any of such sharers for a declaration of his interest in the property" In the case of *Assan* v *Pathumma* (3) the Madras High Court deals with the nature of a partition suit at page 499 —"If on the other hand they were suits for partition, which in my opinion, they really were, *a fortiori* the plaintiffs were entitled to join For in a suit for partition each co owner, as against another, occupies in himself the role of plaintiff as well as defendant It is in consequence of the reciprocal character of the right which co-owners have in the matter of partition that even those who are not actual plaintiffs can claim that their shares be allotted to them by the decree" The learned Judge refers to the case of *Sheikh Khoorshed Hossein* v *Nubbee Fatima*, already referred to, and also to Domat's Civil Law, paragraph 2757 In the case of *Ashidbai* v *Abdulla Haji Muhammad* (4) the learned Judge says, at page

(1) (1878) I L R., 3 Calc 551
(2) (1897) I L R 20 All., 81
(3) (1897) I L R 22 Mad., 494.
(4) (1903) I L R 31 Bom., 271.

persons were bound over to keep the peace In 1909, a suit was instituted by one Yakub, claiming on behalf of the *julahas* a declaration of their right to kill cows It is quite clear that this suit was intended to be a test case and that every step was being taken under professional advice We think that this was a very proper proceeding and that each party ought to have facilitated a full trial on the merits which would settle once and for all, the rights of the parties, and whether such rights were being exercised in a legal manner We say no more as the case is said to be still pending In the *Bakr Id* of the present year two cows were actually sacrificed quietly and secretly in a mosque and a private house This was at once reported by the person concerned to the police. The sacrifices were carried out so quietly that the Hindus did not know of them until the report was made After this the Magistrate took action and bound over the Muhammadans

Two witnesses, a convicted dacoit and a peon, both Musalmans, give evidence as to a cow's head being carried in public Prior to the sacrifices the Muhammadans had given no hint of their intention to carry them out There was no rioting The Hindus became excited, but the Magistrate calmed them down and then proceeded to bind over the other side He on information came to the conclusion that the *julahas* were determined to sacrifice cows and that if they were allowed to do so, the Hindus would resist and there would in all probability be a breach of the peace on future occasions

We are quite satisfied that the Magistrate had not the smallest ground for thinking that the *julahas* (far less any of the applicants) were going to sacrifice cows in an improper manner We mean by this in a manner unnecessarily offensive to the Hindus, *e g*, near a Hindu temple As to the head of a cow being taken out and paraded in the street or thrown into a temple, we do not believe one word of it The two witnesses who depose to it are unworthy of any credit If such a thing had happened, there would have been abundance of proper evidence and the culprit would have been dealt with under the Penal Code The report of the sacrifice was clearly made at the thana in connection with the test case and not for the purpose of

separate according to law, the result of this document would be that Madho Rao made the plaintiffs owners of the property and only fixed a maintenance allowance for the defendant." Having regard to the above allegations, which raised a question which had not been specifically dealt with in the court below, we allowed an adjournment to enable the appellant to produce before us the document of the 31st January, 1905. Mr. *Surendra Nath Sen* has produced a certified copy of the said document. We assume, merely for purposes of argument, that this document of the 31st January, 1905, is a genuine document and proceed to consider its provisions in order to ascertain if it could possibly have any bearing on the present appeal. The document (assuming it to be genuine) was executed by Madho Rao a day before his death. At that time the litigation between Musammat Janki Bai and Parsotam Rao and Madho Rao was still pending. We have already pointed out that Madho Rao in conjunction with Parsotam Rao was at that particular period setting up the case that the family was joint for the purpose of defeating the claim of Musammat Janki Bai as the widow of Baba Ram Chandra Rao. The relevant portion of the document is a declaration by Madho Rao that the family was joint, and an exhortation to his nephew Waman Rao Bhaiya, to whom the document was addressed, as to how he should manage the property, and giving instructions as to the amount of maintenance to be paid to the widow in certain events. *It is* contended that this document ought to be construed as a will and that the declaration as to the family being joint ought to be construed as a bequest of the property of Madho Rao to the other members of the family, as if the family was joint and not separate. We think it quite impossible to give this construction to the document. The document was executed solely for purposes of the then pending litigation, in the hope probably that it might be used as evidence. In the view we take of the true construction of the document, it can have no bearing even on the assumption that it is genuine, on the present appeal. The order of the Court accordingly is that the appeal be dismissed with costs.

*Appeal dismissed.*

[illegible]

author refers to certain debts which are not payable by [illegible] One class of debt is said to be 'Çulka,' which is sometimes translated as toll The author says 'another meaning of the word 'Çulka,' translated toll, is a nuptial present given as the price of a bride, and this has been determined not to be repayable by the son, apparently on the ground that it constitutes the essence of one of the unlawful forms of marriage" We have been unable to find any authority for the above proposition It seems to me that, bearing in mind that this form of marriage is quite common and that the purchase of a bride in this sense is quite common, we cannot hold that the money which was raised was not part of the expenses of a legal marriage With regard to the text of Manu already cited, it is evident that the text of Manu has only been regarded as a disapproval of that particular form of marriage and not as forbidding it Furthermore the injunction is an injunction to the father of the girl against receiving the money and not an injunction against the husband from paying it I would dismiss the appeal

TUDBALL, J —I fully concur, and have very little to add I do not think that in all cases of second marriage a court will be able to hold that the second marriage constitutes "lawful family necessity." A first marriage beyond all doubt does constitute a "lawful family necessity" for the reasons given by Mr Justice CHANDAVARKAR in the case of *Sundrabai* v. *Shivnarayana* (1) But there are clearly cases in which a second marriage constitutes a family necessity equally with a first marriage in the eyes of Hindu society There is an injunction on every male Hindu who enters the form of life of a house holder that he should beget a son for very clear and definite purposes There are religious ceremonies, *e g* the *agnihotri*, to be performed by a man which demand the active aid and assistance of his wife There are many instances of a Hindu wife dying in her childhood and I think it would be repugnant to the ideas prevailing among Hindus to hold that a second marriage in such a case would not be an absolute necessity or to hold that the defraying of expenses of such a marriage would not be a lawful and proper charge on the family A member of a joint Hindu family in

(1) (1907) I. L. R., 32 Bom., 81

Muhammad Hussain, a pleader of Muzaffarnagar. She claims against the representatives of her husband a portion of the dower which was fixed on the occasion of her marriage. The amount of the dower is alleged to have been Rs. 1,25,000. She abandons a large portion of the amount and only claims Rs. 25,000. The parties were married at Lucknow, where the plaintiff resided at the time of her marriage, and the marriage contract was entered into at Lucknow. The wife went with her husband to Muzaffarnagar, of which he was a resident. The learned Additional Judge came to the conclusion that inasmuch as the marriage contract was entered into in Lucknow, he had jurisdiction to administer the law provided by the Oudh Laws Act, Act XVIII of 1876. After hearing the evidence he came to the conclusion that a sum of Rs. 10,000 was an ample sum to allow for dower in view of the means and circumstances of the husband and wife.

From his decision this appeal has been preferred, and the contention before us is that the learned *Additional Judge* of Meerut had no jurisdiction whatsoever to administer the provisions of the Oudh Laws Act, and had no authority to reduce the dower fixed on the occasion of the marriage. The respondents are not represented, and this is to be regretted when a point of law of the importance of the question before us arises. Our attention, however, has been called to a case decided by their Lordships of the Privy Council, which apparently was not brought to the notice of the lea[illegible] Judge. That is the case of *Zakeri Begum* v. [illegible] that case are as follows:—A Muhammadan, a [illegible] was married to the plaintiff, while he was for a time in Lucknow, where she lived. Upon her claim as his widow for her deferred dower, it was found to have been contracted for at the moment alleged by her. It was held by the court of first instance that the question of the amount of her dower was one determinable without reference to the usage having the force of law in Oudh which renders dower reducible in certain cases by the court, and that the place of the celebration of the marriage did not make this law applicable. The decision of the Subordinate

(1) (1892) I. L. R., 19 Calc., 689.

1910

RUP RAM v. MUSAMMAT REWATI.

In this case the plaintiff sued for possession of certain zamindari and house property under the following circumstances. The property had originally belonged to one Narain Das, who died leaving him surviving a widow, Musammat Rewati, and a daughter, Musammat Durga. On the 3rd of December, 1894, Musammat Rewati made an absolute gift of all the property to her daughter Durga, who was then aged about five years. Musammat Durga died in 1900, and her mother remained in possession of the property, which she had probably never parted with. The present suit was filed in 1907. The Court of first instance (Subordinate Judge of Aligarh) decreed the claim, but this decree was reversed and the suit dismissed by the District Judge on appeal. The plaintiff appealed to the High Court.

Munshi *Govind Prasad*, for the appellant.

Mr. *G. W. Dillon*, for the respondents.

RICHARDS, J.—This appeal arises out of a suit in which the plaintiff claimed possession of certain zamindari and house property. It appears that the property in dispute was originally the property of Narain Das, who died leaving him surviving Musammat Rewati, his widow, and Musammat Durga, his daughter. On the 3rd of December, 1894, Musammat Rewati, by a deed of gift, after reciting that she was in possession of her husband's estate, who had died without a son and leaving Musammat Durga, his daughter, made an absolute gift of the property in favour of Musammat Durga, who was then a child, aged about five years. Musammat Durga died in the year 1900, and the present suit was instituted on the 27th of August, 1907. Apparently Musammat Rewati has remained all along in possession. It is said, however, that no question of limitation arises because the plaintiff, Rup Ram, the husband of Musammat Durga, was a minor. The claim of Rup Ram is as heir to Musammat Durga, and it is contended that the effect of the deed of 3rd December, 1894, was to give to Durga and after her death to the plaintiff the interests of Musammat Rewati, and that accordingly his suit for possession ought to be decreed. On the other hand the respondents contend that the only effect of the deed of 3rd December, 1894, was *to accelerate the* estate of Musammat Durga, in other words, that on the execution of that deed,

remainder of the attached property. *Moti Lal* v. *Karrabuldin* (1), *Peacock* v. *Madan Gopal* (2), and *Miller* v. *Lukhmani Debi* (3) referred to

THE facts of this case were as follows:—

One Ram Mohan Lal owned shares in five villages. He was indebted to one Nand Kishore, who brought a suit to realize the amount of the debt. On the 8th of May 1889, Nand Kishore obtained an order for attachment of the property of Ram Mohan Lal before judgement On the 25th of May, 1889, he obtained a decree. This was a simple money decree. On the 25th of August, 1905, the interest of Ram Mohan Lal in the five villages was advertized for sale. Prior to this, namely, on the 9th of October 1899, the plaintiffs appellants purchased the interest of Ram Mohan Lal in one of the villages, and, to save that property from sale under the attachment, they, on the 21st of August, 1905, paid the amount of Nand Kishore's decree. They then sued to obtain contribution from transferees from Ram Mohan Lal of his interest in the other villages.

The Subordinate Judge decreed the suit, but his decree was reversed by the District Judge as against Zahur-ud-din and Fakhar ud din, defendants 1 and 2, on the ground that the property did not belong to Ram Mohan Lal, Zahur-ud-din, defendant 1, being made liable for Rs. 164-4 0, and as against defendants 3, 4 and 5, the suit was *dismissed* for misjoinder of parties and causes of action.

The plaintiffs appealed

Zahur-ud-din filed objections under order XLI, rule 22, of the Code of Civil Procedure

Dr. *Satish Chandra Banerji*, for the appellants:—The agreement for sale executed in favour of Ram Mohan Lal, by the reversioners to the estate of Dube Gopal Sewak passed nothing to him A reversioner has not such an estate as can be transferred He referred to section 6, clause (*a*) of the Transfer of Property Act and to *Nund Kishore Lal* v. *Kanee Ram Tewary*, (4) and *Sham Sundar Lal* v *Achhan Kunwar* (5). Hence, on December 12th, 1882, Ram Mohan Lal himself could convey no interest to Lalji Mal as he had nothing to

(1) (1897) I. L. R., 25 Calc., 179 (2) (1903) I L. R., 29 Calc., 428 (3) (1901) I. L. R., 28 Calc., 419. (4) (1902) I L. R., 29 Calc., 355. (5) (1898) L. R., 25 I. A., 183; I. L. R., 21 All., 71.

1910

RUP RAM v. MUSAMMAT REWATI.

BY THE COURT—The order of the Court is that the appeal is dismissed with costs

*Appeal dismissed.*

---

1910
*May* 12

*Before Mr Justice Richards and Mr Justice Tudball.*

MULLA SINGH (PLAINTIFF) v JAGANNATH SINGH AND OTHERS (DEFENDANTS)*

*Contribution -Decree for costs Some defendants not contesting suit—Liability for contribution not a necessary consequence of a joint decree*

The mere fact that a decree for costs has been made against several persons jointly will not of itself render the co-defendants liable in a suit for contribution, but if one of the defendants pays the full amount of costs and then sues his co-defendants for contribut on he should show some equity existing between himself and h s co judgement debtors making the latter liable for contribution *Dearsly* v *Middleweek* (1) referred to

THE question in this cas was whether the respondents were liable to contiibute towards the amount paid by the appellant in execution of a decree jointly passed against the plaintiff and the resp ndents for the costs of a suit in which the parties to the present suit were arrayed as co-defendants The facts which gave rise to the appeal are fully stated in the judgement of the Court.

Munshi *Gulzari Lal*, for the appellant, contended that the decree was joint against all, and all the persons were jointly and severally liable for the amount of the costs decreed against them and paid by the appellant alone Under the circumstances the plaintiff alone was not liable for the costs, and as he had to pay the entire amount, for which the respondents were also liable, they must contribute their quota of the liability. He relied upon *Siva Panda* v. *Jujusti Panda* (2) and *Kishna Ram* v. *Rakmini Sewak* (3).

Pandit *Baldeo Ram Dave*, for Narain Prasad, respondent, contended that the mere fact that the costs were decreed jointly and severally against all the defendants to the original suit and that those costs were recovered from the plaintiff alone did not

---

* [illegible]

(1) (1881) L R, 18 Ch D, 236 (2) (1901) I L. R., 25 Mad., 599.
(3) (1887) I L. R, 9 All, 221.

properties were not liable for the entire amount of the decree. The decree-holder might have sold and realized the whole amount of his decree out of one of the properties and it would not have been necessary for him to sell other properties. He was only concerned with getting his money and nothing more. The payment of the entire amount due under the decree by the plaintiffs was premature and was simply gratuitous, they cannot claim contribution if they have been too generous.

Dr. *Satish Chandra Banerji* in reply contended that the attachment did create a charge on the attached property, and cited *Gurusami* v. *Venkatsami* (1).

[The argument was at this stage adjourned.]

Babu *Sarat Chandra Chaudhri* (for Dr. *Satish Chandra Banerji*), at a subsequent hearing relied on Pomeroy's *Equity Jurisprudence*, Vol I, section 407, 411, and contended that inasmuch as there was a common burden, namely, the attachment, upon the properties and the plaintiffs had relieved the properties of that burden, they were entitled to contribution. The right would arise where a common liability rested upon several persons Here the parties were in the position of joint debtors subject to the same pecuniary obligation.

STANLEY, C. J , and GRIFFIN, J.:—This appeal is connected with Second Appeals Nos 113 and 114 of 1909. The question involved in them is one of contribution and the claim arises under the following circumstances. One Ram Mohan Lal owned shares in five villages. He was indebted to one Nand Kishore, who brought a suit to realize the amount of the debt. On the 8th of May, 1889, Nand Kishore obtained an order for attachment of the property of Ram Mohan Lal before judgement. On the 25th of May, 1889, he obtained a decree. This was a simple money decree. On the 25th of August, 1905, the interest of Ram Mohan Lal in the five villages was advertised for sale. Prior to this, namely, on the 9th of October, 1898, the plaintiffs appellants purchased the interest of Ram Mohan Lal in one of the villages, and to save that property from sale under the attachment, they, on the 21st of August, 1905, paid the amount of Nand Kishore's decree. They then instituted the suit out of which these appeals

(1) (1890) I. L. R., 14 Mad., 277, 223

mortgage he stated that he would bring an independent suit Mulla in his written statement which was a separate one from that of Narain Prasad, stated that he had nothing to do with the property, and that the real person interested was Narain Prasad Jagannath disputed the first four mortgages and succeeded in getting in the first instance the suit dismissed The plaintiff appealed making Mulla and Narain Prasad respondents as well as Jagannath Jagannath alone appeared Narain Prasad and Mulla were unrepresented The Court allowed the appeal, and a decree followed ordering the respondents, which of course included Narain Prasad and Mulla, to pay the costs incurred by the appellant Jagannath it appears, is a man of straw, and when the decree holder came to execute his decree for costs, he executed it against Mulla alone, who was obliged to pay all the costs Mulla then instituted the present suit against Jagannath and other persons, including Narain Prasad, claiming contribution in respect of the decree for costs which he had been obliged to satisfy The court of first instance held that it was Jagannath alone who had caused all the trouble, and it gave Mulla a decree as against him exempting the other defendants including Narain Prasad The lower appellate court confirmed the decree of the Munsif Hence the present appeal The appellant contends that he and the judgement debtors other than Jagannath were all equally innocent, and that he having paid the decretal amount is entitled to contribution Of the respondents Narain Prasad alone appears, and he contends that it is necessary, before the plaintiff can obtain contribution that he should show some equity existing between the plaintiff and his co judgement debtors making the latter liable to contribution In the present case if either Mulla or Narain Prasad had appeared in the appellate court in all probability there would have been no decree for costs against either one or the other of them Both neglected to take this precaution, and it is contended that the mere fact that a binding and conclusive decree is passed between the plaintiff in the original suit and the defendants to that suit does not render the judgement debtors liable as a matter of course, and that as between the judgement-debtors the decree is not in any way conclusive After carefully considering the matter we have come to the conclusion that the

sale Before a sale took place the plaintiffs appellants voluntarily paid the amount of the decree and relieved the property from the attachment The defendants respondents were never liable to satisfy that decree, which, as we have said, was a simple money decree The sole liability to discharge the decree rested upon the judgement-debtor The fact that the plaintiffs appellants in order to protect from sale the property purchased by them paid the amount of the decree and so relieved the entire property from the attachment does not give them a right of contribution Under such circumstances there being no common burden—no common liability—we are of opinion that a right of contribution did not arise, and upon this ground the appeal must fail

An objection was filed under order XLI, rule 22 In the lower appellate court a decree was passed for Rs 164 with proportionate costs *et cetera* against Zahur-ud-din and Fakhr ud-din The contention is that no decree ought to have been passed against these parties, and, in view of what we have said above, this objection is well founded

We accordingly dismiss the appeal We allow the objection, and, setting aside the decree of the lower appellate court, dismiss the plaintiff's suit with costs in all courts

*Appeal dismissed*

---

*Before Mr Justice Richards and Mr Justice Tudball*

KUNJI LAL (PLAINTIFF), *v* DURGA PRASAD AND OTHERS (DEFENDANTS)*

*Civil Procedure Code* (1882), *sections* 13 525 *and* 526—*Res judicata—Order refusing to file an award on the ground of misconduct of arbitrators—Subsequent suit to enforce the award*

*Held* that the refusal of a court to file a private award on the ground of misconduct of the arbitrators will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award. *Bhola* v *Gobind Dayal*, (1) *Kalib Ram* v *Balu Lal* (2) and *Basant Lal* v *Kunji Lal* (3) followed. *Ghulam Khan* v *Muhammad Hassan* (4) referred to.

THIS was a suit brought to enforce an award. The defence was that there had been an application under section 525 of the

* First Appeal No 270 of 1909 from a decree of Chhajju Mal Subordinate Judge of Mainpuri, dated the 17th of August 1908.

(1) (1884) I. L. R., 6 All., 186
(2) Weekly Notes, 1903, p 234
(3) (1905) I. L. R., 28 All., 21
(4) (1901) I. L. R., 29 Calc., 167.

*Before Mr. Justice Richards and Mr. Justice Tudball.*

DEBI SAHAI AND ANOTHER (PLAINTIFFS) *v.* GANGA SAHAI AND OTHERS (DEFENDANTS).*

*Act No. IX of 1872 (Indian Contract Act) sections 16 and 19A—Contract—Undue influence—Facts necessary to justify interference of court on the ground of undue influence.*

The power of a court to interfere with contracts alleged to be unconscionable is limited by the provisions of the Indian Contract Act, 1872, sections 16 and 19A. The fact that an excessive rate of interest is charged in a contract is not alone sufficient to establish that the making thereof has been induced by undue influence, but the court must also find that the lender was in a position to dominate the will of the borrower when the contract was entered into before any presumption arises that the contract was induced by undue influence. *Balkishen Das* v. *Madan Lal* (1) *Kirpa Ram* v. *Sami-ud-din Ahmad Khan* (2) and *Dhanipal Das* v. *Maneshar Bakhsh Singh* (3) referred to.

THE facts of this case were as follows :—

The defendant No. 1, who was the father of the other defendants, had executed in favour of the plaintiffs two mortgage-deeds for Rs. 215 and Rs. 99 on August 5th, 1897, and December 5th, 1899, respectively. The rate of interest in the first deed was Re. 1-14-0 per cent. per mensem, compound interest, with annual rests. There was a similar stipulation for compound interest in the second bond, but the rate agreed upon in this case was Re. 1-10-0 per cent. per mensem. The defendants had paid only Rs. 150, so the plaintiffs sought to recover the balance. The defendants pleaded, *inter alia*, that the rate of interest and compound interest entered in both the bonds were very severe and penal, and it was not enforcible by the court.

The courts below decreed the claim, but allowed interest at the rate of 2 per cent. per mensem, simple interest only. The judgement of the District Judge was as follows :—

"In this matter the learned Subordinate Judge has reduced the rate of interest on two bonds as unconscionable. The appellants appeal against the reduction. The defendants pleaded that the rate of interest was hard and unconscionable, but even had they not done so, it has been laid down in *Poma Dongra* v. *William Gillespie* (4) and *Balkishan Das* v. *Madan Lal* (1) that a court can *suo motu* reduce interest as unconscionable. It has been

(1) Weekly Notes, 1907, p. 55.
(2) (1903) I. L. R., 25 All., 281.
(3) (1903) I. L. R., 28 All., 570.
(4) (1907) I. L. R., 31 Bom., 348.

which the award relates, that the award may be filed in court. The application shall be in writing, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. The court shall direct notice to be given to the parties to the arbitration other than the applicant requiring them to show cause within a time specified why the award should not be filed." Section 526 then provides :—"If no ground such as is mentioned or referred to in section 520 or section 521, be shown against the award, the court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter." If the application after it has been numbered and registered as a suit could be treated as a suit in the proper sense of the word, the order of the court whether it granted the application to file the award or refused it would be a decree. The order refusing to file the award would be appealable as a decree and the order granting leave to file the award would also be appealable, subject perhaps to the provisions of section 522 of the Code of Civil Procedure. We think that a great deal can be said in favour of the argument that the Legislature intended that when the application was numbered and registered it should be deemed a suit. The Court as soon as it has numbered and registered the application is bound to consider the matters mentioned in section 520 and section 521. One of the matters mentioned in section 521 is the very question which was tried in the present case, namely, whether or not there had been misconduct on the part of the arbitrator. It seems to us that it is hardly likely that the Legislature intended to provide this machinery to try such questions, and that the finding could be re-opened immediately, by bringing a regular suit. It seems to us that the trying of such question a second time involves the parties in a large amount of unnecessary litigation and a waste of the time of the Court. In the case of *Ghulam Khan* v. *Muhammad Hassan* (1) Lord Macnaghten says :—"The question appears to their Lordships to turn upon the true construction and effect of the provisions of the Code of Civil Procedure relating to arbitration. The decisions of the Indian courts on these provisions are so conflicting

(1) (1901) I. L. R., 29 Calc., 167.

already referred, was cited in this case, the learned Judges described the remarks of their Lordships of the Privy Council at page 184 of I L R., Calcutta, Vol XXIX, as a dictum, and said that the words used by their Lordships referred only to an order granting leave to file an award In the case of *Basant Lal* v *Kunji Lal* (1) the same question arose The decision of their Lordships of the Privy Council in *Ghulam Khan* v *Muhammad Hassan* as also the decision of this court in *Katik Ram* v *Babu Lal* were referred to and it was again held that the order refusing to file the award was unappealable on the same ground, namely, that it was not a decree Of course the only reason for holding it not to be a decree was that the order was not made *in a suit* The High Courts of Calcutta and Madras have taken a different view It was suggested that perhaps this appeal might be referred to a larger Bench We have considered this matter There is no doubt that at the time when the court refused the application to file the award the plaintiff in the present suit could not have appealed against the order having regard to the ruling of the court His only remedy was to bring a fresh suit We, therefore, think that we ought to follow the decisions of the High Court in the cases of *Katik Ram* v *Babu Lal* and *Basant Lal* v *Kunji Lal* We, therefore, hold (following the rulings referred to) that the issue as to the misconduct of the arbitrators was decided in a proceeding which was not a suit within the meaning of section 13 of Act XIV of 1882 and that the decision on the said issue, accordingly, cannot operate as *res judicata* We therefore allow the appeal and set aside the decree of the court below As the suit was decided on a preliminary point, we remand the case to the lower court with directions to readmit the suit on its original number in the register and proceed to determine it on the merits Costs will abide the result

*Appeal decreed and cause remanded*

(1) (1905) I L R, 28 All 21

Registered No. 422.

VOL. XXXII.] [PART XII.



# THE INDIAN LAW REPORTS.

## DECEMBER 1910.

(Pages 599—659.)

## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council ... J. V. WOODMAN, *Middle Temple.*
High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*



ALLAHABAD:

PRINTED BY F. LUKER, SUPERINTENDENT, GOVERNMENT PRESS, AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT, UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

Price, Re. 1.

among the *Bisa* Brahmans Section 2 of the Widows' Re-marriage Act applied

Pandit *Mohan Lal Sandal*, replied

STANLEY, C J, and BANERJI, J —The suit out of which this appeal has arisen was brought by the plaintiff respondent for possession of certain property which belonged to one Siria He claims as the next reversioner to Siria Siria died leaving a widow, Musammat Mathuri, and his mother, Musammat Tulsha. These ladies made a gift of the property in favour of one Nanda, who is now dead Chhajju, the brother of Nanda, mortgaged a part of the property to Kabul, defendant No 3, and Sukh Ram, and he also sold a portion to the defendants 5, 6, 7 and 8 Musammat Tulsha is dead

It has been found that the widow, Musammat Mathuri, has married again The plaintiff claims the property on the ground that by reason of Mathuri's second marriage she has forfeited her rights to the property of her first husband, and that the plaintiff is therefore entitled to the possession of it The parties belong to the caste of Taga Brahmans

The court below has found, and the correctness of its finding is not challenged in this appeal, that there are two classes of Taga Brahmans called respectively *Bisa Tagas* and *Dasa Tagas* The parties belong to the class of Bisa Tagas Among Bisa Tagas re marriage of widows is not allowed, but if a widow does re marry she becomes a Dasa Taga and this re marriage, although it reduces her to the rank of Dasa Tagas, is regarded as valid The result of the finding therefore is that the second marriage of Musammat Mathuri is a valid marriage, according to the custom of the caste, the effect of the marriage being to reduce the re married wife to the rank of Dasa Tagas The learned Judge of the court below holds that as there has been a valid re marriage of Musammat Mathuri, she forfeited her rights to the estate of her first husband under the provisions of section 2 of Act XV of 1856.

It is contended that this conclusion is erroneous and that Act No XV of 1856 does not apply to a case like this where a re marriage is valid according to the custom of the caste and independent of the provisions of the Act. Having regard to the

BOOKS AND PUBLICATIONS FOR SALE

BY THE

SUPERINTENDENT OF GOVERNMENT PRINTING, INDIA.

8, HASTINGS STREET CALCUTTA

*books published by the Superintendent of Government Printing, India can be purchased either or through the following or any other booksellers :—*

AGENTS.

| | |
|---|---|
| CALCUTTA.—*Thacker Spink & Co* | BOMBAY.—*Thacker & Co., Ld* |
| MADRAS.—*Higginbotham & Co* | *Radhabai Atmaram Sagoon* |

*NOTICE.—Books required for private use only can be purchased. Applications should be accompanied by a remittance unless it is wished that the books should be sent by value payable post. In such case, besides the ordinary postage, an additional charge will be made for registration and ...ation.*

*Books required for the Public Service should be obtained through Local Governments*

*☞ The amounts within parentheses are for packing and postage*

## List of Books and Publications for sale which are less than two years old

## LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India No 8 Hastings Street, Calcutta ]

THE PRICES OF THE GENERAL ACTS LOCAL CODES, MERCHANT SHIPPING, DIGEST INDEX TO ENACTMENTS AND THE DIGESTS OF INDIAN LAW CASES, 1901 TO 1907 (SEPARATELY AND PER SET OF FIVE VOLUMES) HAVE BEEN CONSIDERABLY REDUCED

THE BRITISH ENACTMENTS IN FORCE IN NATIVE STATES WERE ISSUED BY THE FOREIGN DEPARTMENT.

### I.—THE INDIAN STATUTE BOOK.

REVISED EDITION

*Super royal 8vo, cloth lettered*

B.—GENERAL ACTS

| | |
|---|---|
| General Acts of the Governor General of India in Council, Vol I, from 1834 to 1867 Edition 1909 | Rs 6 (10 a) |
| General Acts of the Governor General in Council Vol II, from 1868 to 1878 Edition 1909 | Rs 7 (10 a) |
| General Acts of the Governor General in Council, Vol III, from 1879 to 1886, Edition 1909 | Rs 6 (9 a) |
| General Acts of the Governor General in Council, Vol IV, from 1887 to 1897 Edition 1909 | Rs 6 (9 a) |
| General Acts of the Governor General in Council, Vol. V, from 1898 to 1903 Edition 1909 | Rs 6 (9 a) |
| General Acts of the Governor General in Council, Vol VI, from 1904 to 1908 Edition 1909 | Rs 7 (12 a) |

C.—LOCAL CODES

The Bengal Code Third Edition 1905, containing the Regulations and Local Acts in force in Bengal Vols I to V Rs 6 a volume or Rs 30 Reduced to Rs 20 for set of 5 vols.

24th of April, 1899, and also to recover another sum of Rs 1,510 15-5 alleged to have been an excess charge as octroi duty on imports made between 24th of April, 1899, and the 6th of October, 1901 The plaintiffs alleged that, in respect of the first item of claim, all sea borne goods were exempt from duty by a Resolution of the Government of India, dated the 6th of November, 1868, and that, in respect of the second item, the Board charged in excess of the maximum duty chargeable under Resolution of the Government of India Nos 55 to 60 of the 24th of April, 1899

Both the court of first instance and the court of appeal at Ajmere dismissed the suit as barred by limitation under article 2, schedule II to the Indian Limitation Act, XV of 1877

Upon the application of the plaintiff company, the Judicial Commissioner and District Judge of Ajmere Merwara referred the case for a ruling by the Hon'ble High Court

Mr *M L Agarwala*, for the plaintiffs applicants, contended that under the Resolution of the Governor General in Council, dated the 6th of November, 1868, sea borne goods imported into India between the 20th of January, 1899, and 24th of April, 1899, were exempt from octroi duty, and that under the Resolution, dated the 24th of April, 1899, a maximum of octroi duty was fixed and the Municipal Board was not competent to exceed the limit fixed thereby The Resolutions aforesaid had the *force of* law, and the Municipal Board had no right to ignore them Ignorance of the Resolutions could not validate any act of the Municipal Board which militated against the provisions thereof A suit for a refund of the octroi duty levied illegally was a suit for money had and received, and, as such, was governed by article 62 of the Limitation Act

*Babu Surendra Nath Sen* (for *Babu Jogindro Nath Chaudhri*), for the opposite party, admitted that the Resolutions of the Governor General in Council had the force of law and were binding on the Municipal Board, and that it was beside the question whether the said Resolutions were or were not communicated to the Municipality of Ajmere He also admitted that the octroi schedule prepared by the Municipality in violation of the aforesaid Resolutions could not be justified. The

as modified up to 1st January, Rs 1 ? 0 (3 a)

Act V of 1869 (Indian Articles of War) as modified up to 1st October 1 a. (1 a)
1909 Rs 1 ?0 (2 a)
Act V of 1870 (Unclaimed Deposits) as modified up to 1st February 1909
1908
Act VII of 1870 (Court Fees), as modified up to 1st September 2 a 3 p (1 a)
Act XXIII of 1871 (Pensions) as modified up to 1st October, 6 a 6 p (1 a 6 p)
1909 Re 1 (? a)
Act XXVII of 1871 (Criminal Tribes) as modified up to 1st May 1908 Re 1 4 a (? a)
1908
Act I of 18 2 (Evidence) as modified up to 1st February 1908 ? a 6 p (1 a.)
Act IX of 1872 (Contract) as modified up to 1st September 5 a 6 p. (1 a)
Act IX of 18 4 (European Vagrancy) as modified up to 1st October, 1907
1909
Act I of 18 8 (Opium) as modified by Act XII of 1891 as 3 a 9 p (1 a.)
Act VI of 18 8 (Treasure Trove), as modified up to 1st June 1908 Re 1 5-3 (4 a)
reprinted on the 14th February 1908
Act VIII of 1878 Sea Customs) as modified up to 1st March 1910 .. 6 a (1 a)
Act XI of 18 8 (Arms) as modified up to 1st October .. 1 a 6 p (1 a)
Act XVI of 1879 (Transport of S l ) as modified up to 1st September 4 a 9 p (1 a)
1?0 5 a 6 p (1 a 6 p)
Act XIII of 1880 (Vaccination) as modified up to 1st April 1910
1909
Act XV of 1881 (Factories) as modified up to 1st ... as modified up Rs 1 2 0 (3 a)
Act XVIII of 1881 (Central Provinces Land revenue) as modified up to 1st
to 1st March 1909 10 a (1 a)
Act XXVI of 1881 (Negotiable Instruments) as modified up to 1st 10 a (1 a)
September 1909 7 a (2 a)
Act II of 188? (Indian Trusts) as modified up to 1st June 1909
Act XII of 188? (Salt) as modified up to 1st August 1909 6 a (1 a)
Act V of 1883 (Indian Merchant Shipping) as modified up to 1st Sep 4 a (9 p) (1 a)
tember 1909 1 a 6 p (1 a)
Act IV of 1884 (Explosives) as modified up to 1st September 1908 1 a 9 p (1 a)
Act IX of 1884 (Legal Practitioners) as modified up to 30th June 1909 1 a 3 p (1 a)
Act III of 1888 (Police) as modified up to 1st January 1909
Act II of 1889 (Measures of Length) with footnotes
Act IV of 1889 (Indian Merchandise Marks) as modified up to 1st 6 a (1 a)
August 1908 2 a 9 p (1 a.)
Act VI of 1889 (Probate and Administration) as modified up to 1st
January 1909 2 a 6 p (1 a)
Act VI of 1890 (Charitable Endowments) as modified up to 1st August Re 1 ? 0 (? a.)
1908 2 a (1 a)
Act IX of 1890 (Indian Railways) as modified up to 1st June 1909
Act XI of 1890 (Prevention of Cruelty to Animals) with foot notes .. 1 a 6 p (1 a)
Act XIII of 1890 (Excise Malt Liquors) as modified up to 1st October
1908 1 a (1 a)
Act X of 1891 (Indian Penal Code Amendment) as modified up to 1st
August 1909 2 a (1 a)
Act XII of 18 5 (Indian Companies Memorandum of Association) as 4 a (1 a)
modified up to 1st August 1909
Act III of 1898 (Lepers) as modified up to 1st September 1909 1 ? 3 10 a (? a)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st 7 a (1 a)
? August 1909
Act VIII of 1899 (Petroleum) as modified up to 1st January 1909 .. a. ? p (1 a)
Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February
1908

Ajmere for recovery of a sum of Rs 81-7 0 said to have been wrongly charged against them by the Board for octroi duty for goods imported into India by sea between the 20th of January, 1899, and the 24th of April, 1899, and also to recover a sum of Rs 1,510 15 5 alleged to have been charged against the Company for octroi duty on goods similarly imported between the 24th of April, 1899, and the 6th of March, 1901, in excess of the maximum duty chargeable The allegation of the Company is that, in respect of the duty charged during the first mentioned period, sea borne goods are distinctly exempted from duty by the Resolution of the Governor General in Council, *dated the 6th* of November, 1868, and as to the rest of its claim, the Company says that from the 24th of April, 1899, to the 6th of March, 1901, the Board wrongly charged the plaintiff Company the sum above mentioned in excess of the maximum duty chargeable under the Resolutions, of the Government of India Nos 55 to 60 of the 24th of April, 1899 The prayer of their plaint is that a decree may be passed in favour of the plaintiff Company for the two sums abovementioned

The learned Assistant Judicial Commissioner dismissed the suit, holding that the claim fell within article 2 of schedule II to the Limitation Act, and was barred by limitation

This decision was upheld by the learned District Judge

The present reference has been made and a ruling of this Court is solicited on the following points —

(1) Whether the case is governed by article 2 of schedule II of the Limitation Act XV of 1877, or article 61 or 62 or 120?

(2) Whether the Resolutions of the Government of India, dated the 6th of November, 1868, and 24th of April, 1899, applied?

We shall first deal with question No 2 In 1868, Ajmere was under the administration of the Government of the North Western Provinces In 1869 it became a separate administration, but in 1871 was placed under the Government of India In the Resolution of the Government of India of the 6th of November 1868 which appears in the issue of the Gazette of the 14th of November, 1868, articles liable to customs duty and imported into India by sea were exempted from assessment to octroi duty

| | | |
|---|---|---|
| Act VI of 1890 (Char table Fnd wments) as modif ed up to 1st August 1908 | In Urdu | 6 p (1 a) |
| D tto d tto | In Nag i | 9 p (1 a) |
| Act XII of 1896 (Excise) as n od fied up to 1s March 1907 | In Urdu | 2 a 9 p (3 a) |
| D tto ditto | In Nagr | 3 a 3 p (2 a) |
| Act XIII of 1899 (Glanders and Farcy) as mod fied up to 1st February 1908 | In Urdu | 9 p (1 a) |
| D tto ditto | In Nagri | 9 p (1 a) |
| Act I of 1906 [Ind an Tariff (Amendment)] | In Urdu | 3 p (1 a) |
| D tto ditto | In Nagri | 3 p (1 a) |
| Act III of 1906 (Co nage) | In Ur l | 9 p (1 a) |
| Ditto d tto | In Nagri | 9 p (1 a) |
| Act V of 1906 (Stamp Amendm nt) | In Urdu | 3 p (1 a) |
| D tto d tto | In Nagri | 3 p (1 a) |
| Act III of 1907 (Prov nc al Insolvency) | In Urdu | 1 a 0 p (1 a) |
| D tto | In Nagri | 1 a 6 p (1 a) |
| Ac IV of 1907 [Repeal n and A ending (Rates and C ss s)] | In Ur u | 3 p (1 a) |
| D tto d tto | In Nagri | 3 p (1 a) |
| Act V of 1907 (Local Authorit es Loan) | In Urdu | 3 p (1 a) |
| Ditto d tto | In Nagri | 3 p (1 a) |
| Act VI of 190 (P ev o of Sed t ous Meet ng ) | In Ur lu | 3 p (1 a) |
| D tt d to | In Nagri | 3 p (1 a) |
| Act I of 1908 (Leg l Pra t t o e s) | In Urdu | 3 p (1 a) |
| I t o d tto | In Nagr | 3 p (1 a) |
| Act II of 1908 (Tariff) | In Urdu | 3 p (1 a) |
| D tto | In Nagri | 3 p (1 a) |
| Act III of 1908 [Ind an T us s Amendment] | In Urdu | 3 p (1 a) |
| Act V of 1908 (Code of C v l P ocedure) | In Urdu | Rs 1 2 (6 a) |
| D t o d tto | In Nagri | Rs 1 2 (6 a) |
| Act VI of 1908 (Explosives Substanc s) | In Urdu | 3 p (1 a) |
| D tto d tto | In Nagri | 3 p (1 ) |
| Act VII of 1908 (Inc te n nts to Offenc s) | In Urdu | 3 p (1 a) |
| D tto d tto | In Nagri | 3 p (1 a) |
| Act IX of 1908 (L mitat on) | In Urdu | 2 a (1 ) |
| D tto d tto | In Nagri | 2 a (1 a) |
| Act X of 1908 (S lt Dut es) | In Urdu | 3 p (1 a) |
| D tto | In Nagri | 3 p (1 a) |
| Act XI of 1908 (Ass m L bo r and Em grat ) | In Urdu | 3 p (1 a) |
| D tto d tto | In Nagri | 3 p (2 a) |
| Act XIV of 1908 [Ind an Cr m n l Law (Amendment)] | In Urdu | 3 p (1 a) |
| D tto d tto | In Nagri | 3 p (1 a) |
| Act XVI of 1908 (Ind an Registration) | In Urdu | 2 a (2 a) |
| D tto d tto | In Nagri | 2 a (2 a) |
| Act XVII of 1908 (Ind an E n grat on) | In Urdu | 2 a 3 p ( a) |
| D tto ditto | In Nagri | 2 a 3 p ( a) |
| Act I of 1909 (Ind an Steamship Law Amen lment) | In Urdu | 3 p (1 a) |
| D tto d tto | In Nagri | 3 p (1 a) |
| Act IV of 1909 (Wh pp n ) | In U du | 3 p (1 a) |
| D tto | In Nag i | 3 p (1 a) |
| Act V of 19 9 [Amend ng (A my Act)] | In Urdu | 3 p (1 a) |
| D tto d tto | In N gr | 3 p (1 a) |
| Act VII of 1909 (Anand Marr age) | In Urdu | 3 p (1 a) |
| ditto ditto | In Nagri | 3 p (1 |

No. 2 in the affirmative, namely, that the Resolutions of the Government of India of 1868 and 24th of April, 1899, do apply.

The remaining question for consideration is whether the present case is governed by article 2 of schedule II to the Limitation Act, or article 61 or 62 or 120. Articles 61 and 120 clearly do not apply. The language of article 62 is borrowed from the form of count in vogue in England under the Common Law Procedure Act of 1852. Prior to the passing of the Supreme Court of Judicature Acts of 1873 and 1875, there was a number of forms of pleading known as the *common indebitatus* counts, such as counts for money lent, money paid by the plaintiff for the use of the defendant at his request, money received by the defendant for the use of the plaintiff, &c. These forms are no longer in use. Statements of claim must now be more specific and must contain a statement in a summary form of the material facts on which the plaintiff relies. The most comprehensive of the old common law counts was that for money received by the defendant for the use of the plaintiff. This count was applicable where a defendant received money which in justice and equity belonged to the plaintiff under circumstances which rendered the receipt by the defendant to the use of the plaintiff. It was a form of suit which was adopted when a plaintiff's money had been wrongfully obtained by the defendant, as for example, when money was exacted by extortion, or oppression, or by abuse of legal process, or when over-charges were paid to a carrier to induce him to carry goods or when money was paid by the plaintiff in discharge of a demand illegally made under colour of an office. It was a form of claim *which was applicable* when *the plaintiff's money* had been wrongfully obtained by the defendant, the plaintiff in adopting it waiving the wrong and claiming the money as money received to his use [*e g.*, see *Morgan* v. *Palmer* (1); also *Neate* v. *Harding* (2)].

A suit for compensation or damages is a suit of a different nature. In it a plaintiff does not seek for the return of a specific sum of money, but for damages to be assessed by the court for a wrongful act. Now in the case before us the plaintiff Company

(1) (1824) 2 B. & C., 729; 26 R. R., 537. (2) (1851) 6 Ex. 349; 86 R. R., 329.

In the judgement in *Narpat Rai* v *Sirdar Kirpal Singh*, in the same number of the Punjab Record, at page 138, which was also relied upon by the courts in Ajmere, it is stated that to bring a suit for a refund under article 2 it is requisite for the defendant to show amongst other things that the relief sought falls under the term "compensation" as used in this schedule We agree as to this

But if it was intended by the learned Judges in these cases to lay down the proposition that, when a plaintiff has an option to bring his suit in the form of a suit for money received by the defendant for his use or in the form of a suit for compensation for doing or omitting to do an act alleged to be in pursuance of an enactment in force for the time being in British India and he elects to proceed for money received for his use, the fact that he might have claimed damages or compensation entitles the defendant to the benefit of the shorter period of limitation allowed by article 2, we cannot agree with them If the relief sought in the claim had been for damages or compensation, different considerations would arise In the case before us the relief is not such The claim is one for specific sums received by the defendant Municipality for the plaintiff Company, and cannot, we think, be properly regarded as a claim for Compensation or damages

For these reasons we are of opinion that article 62 is the article of the Limitation Act which applies to the case and that neither article 2, nor article 61, nor 120, has any application

This is our answer to the reference

one for money was not barred of not satisfied within 12 years, and, further, that the limitation of 12 years did not apply to mortgage decrees He relied on *Jug Ram* v *Jewa Ram* (1), *Thakur Prasad* v *Ahsan Ali* (2), *Gokul Singh* v *Birj Lal* (3), *Deb Narain Dutt* v *Narendra Krishna* (4) and *Ashfak Husain* v *Kalian Das* (5)

*Gulzari Lal*, for the respondent, submitted that the question was one of procedure and no one had a vested right in any form of procedure The provisions in the new Code applied He relied on *Hazrat Akramnissa* v *Valiulnissa* (6) and *Vedavalli Narasiah* v *Mangamma*, (7)

KNOX, J —The facts of this case are —Musammat Kaunsilla on the 24th of November, 1893, obtained a decree against one Ishri Singh This decree she first put into execution on the 24th of January, 1895 Several other applications were made by her for execution All these were infructuous, but in each one of them apparently some step was taken in aid of execution and the present application was instituted within three years of a previous application for execution to a proper court in accordance with law On the 25th of February, 1909, she instituted the proceedings out of which the present appeal has arisen The judgement debtor at once took a plea based upon section 48 of Act No V of 1908 that as more than twelve years had expired from the date of the decree no order for execution could be made Both the courts below have accepted this plea and summarily rejected the application They were of opinion that section 48 above mentioned did bar execution

In appeal before us it is urged that section 48 does not apply to these proceedings inasmuch as the decree was passed in 1893 and these proceedings are in regular continuation of proceedings instituted in 1895, both coming into force at a time when there was no provision of law limiting execution other than article 179 of Schedule II of Act No XV of 1877 It may at once be conceded that if Act No V of 1908 had not been placed upon

(1) (1909) 6 A L J 647
(2) (1878) I L R., 1 All., 668
(3) Weekly Notes 1885 p 130
(4) (1889) I L R 16 Calc 267 (273)
(5) Weekly Notes 1889 p 106
(6) (1893) I L R 18 Bom. 429
(7) (1903) I L R 27 Mad 538

liability acquired, accrued or incurred under the enactment so repealed or affect any remedy in respect of any such right

The right to enforce execution of a decree like the present is a substantive right It was in existence before Act No V of 1908 came into force, and the decree holder had the remedy to enforce his right so to speak till the end of time if he prosecuted his right with legal diligence As neither Act No XIV of 1882 nor any Limitation Act curtailed that right or remedies to enforce that right, it seems to me we have not to consider them or their repeal

What we have to consider is solely whether section 48 of Act No V of 1908 without express provision to that effect can curtail the remedy which the decree holder had before that Act came into force, and the answer is that no Statute shall be so construed as to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication Statutes are to be construed as operating only on cases or facts which come into existence after they are passed *Smith* v *Callander* (1)

As Willes, J, pointed out in *Phillips* v *Eyre* (2) —" Retrospective laws are, no doubt, *primâ facie* of questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law '*Leges et constitutiones futuris certum est dare formam negotiis non ad facta præterita revocari, nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit*' Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the Legislature "

This is particularly to be borne in mind when a defence of limitation is set up As was pointed out in *Roddam* v *Morley* (3), limitation as a defence is the creature of positive law and

(1) (1901) A C. 297 (2) (1870) L. R., 6 Q B 1 (23)
(3) (1857) 1 DeG & J 1 (23)

PAGE.

application was refused by the court, and against that order of refusal the present appeal was preferred

Maulvi *Ghulam Mujtaba* (with him Mr *B E O'Conor*), for the respondents, took a preliminary objection to the hearing of the appeal —The matter which was referred to arbitration was the question of the appointment of a proper person as *mutawalli* Such a matter could not validly be made the subject-matter of a private arbitration , and the award was, therefore a nullity The court of the Subordinate Judge had no jurisdiction to deal with the award in any way , the only court having jurisdiction to deal with such matters being that of the District Judge The High Court could not, therefore, hear an appeal from that order

Dr. *Tej Bahadur Sapru* (with him The Hon'ble Nawab *Muhammad Abdul Majid*), for the appellant, contended in reply to the preliminary objection that there was no bar in law to the hearing of the appeal The Subordinate Judge had, rightly or wrongly, dealt with the matter and passed an order That order was appealable, and there was nothing to preclude the High Court from entertaining the appeal

The court overruled the preliminary objection, but directed the appellant to confine his arguments, in the first instance, to the points of law raised by the respondent.

Dr *Tej Bahadur Sapru* —The first question is whether there is any statutory bar in the way of the claimants to the office of *mutawalli* referring the matter to private arbitration , and, secondly, whether the Legislature has declared any particular court as being the only court having jurisdiction to entertain such a matter We have to look either to the Religious Endowments Act (XX of 1863) or to section 92 of the Code of Civil Procedure (Act V of 1908) As to the Religious Endowments Act, the preamble to it shows that it has no application to a case like the present The whole object of that Act was to relieve the Board of Revenue from superintendence over *lands* granted for the support of mosques, &c The suit contemplated by section 14 of that Act is of a limited scope and does not relate to the appointment of a trustee or *mutawalli* Then, even in those matters to which the Religious Endowments Act does

have rightly been referred to arbitration, the same matter could also rightly be referred to arbitration without a suit having been brought about it, for there is no difference in principle between the two cases Under the Charitable Trusts Act of 1853 in England disputes among members of any charity regarding management of the charity may be referred to the arbitration of the Charity Commissioners Russell, *Arbitration* 9th Ed, p 22 Then there is no reason why by analogy a dispute like the present cannot be referred to arbitration I already submitted that the Indian Act XX of 1863 section 16, have also allows certain matters to be referred to arbitration

Again, a submission to arbitration is a matter of contract The liberty of persons to enter into contracts is not to be restricted unless the contract is bad or opposed to public policy It has never been laid down that a contract to refer to arbitration a dispute relating to the right of succession to a *mutawalliship* is bad or opposed to public policy The doctrine of public policy should not be extended too far, nor can a new head of public policy be invented by a court, *Printing and Numerical Registering Company* v *Sampson* (1) and *Richardson* v *Mellish* (2)

Maulvi *Ghulam Mujtaba* (with him Mr *B E O Conor*), for the respondents —

The matter in dispute cannot be referred to arbitration either privately or through the medium of a court Section 92, Civil Procedure Code, lays down that the only tribunal which can deal with a matter the effect of which is to appoint a *mutawalli* of trust property is the court of the District Judge And even the District Judge has no jurisdiction to refer the matter to arbitration I rely on the principle laid down in *Mahadeo Prasad* v *Bindeshri Prasad* (3) It was not a private right of the rival claimants that was in question, it could not, therefore, be referred to arbitration, their private property was not in dispute Russell, *Arbitration*, chapter II, page 27 Under the Muhammadan Law it is the Qazi alone who can decide a dispute regarding succession to *mutawalliship* of a *waqf*, Ameer Ali,

(1) (1875) L R 19 Eq Cases 462 (465). (2) (1824) 2 Bing 229 27 R. R. 603 (622)

(3) (1908) I L. R., 30 All., 137.

death of the widow of Raghuraj Singh) on the nearest male heir, who was the appellant Reference was made to the Oudh Estates Act as amended by Act X of 1885, sections 8, 10 and 22, clauses (5) and (11), the Oudh Settled Estates Act (II of 1900) Edition of 1903, Lucknow, by R G T Jacob, p 103 Sykes' Compendium of Taluqdari Law, pages 80 (bottom of page), 81, 101 (bottom of page) and 103, *Achal Ram* v. *Udai Partab Addiya Dat Singh* (1), *Bhaie Narindar Bahadur Singh* v *Achal Ram* (2), *Balbhaddar Singh* v *Sheo Narain Singh* (3), *Brij Indar Bahadur Singh* v. *Rani Janki Koer* (4), *Ran Bijai Bahadur Singh* v. *Jagatpal Singh* (5) and *Jagdish Bahadur*, v *Sheo Partab Singh* (6)

*DeGruyther* K C and *Kenworthy Brown* for the respondent contended that the judgement appealed from had rightly decided that the succession to the property in suit was governed by the rule of lineal primogeniture Reference was made to Sykes' Compendium of Taluqdari Law, pages 385, 386, 389, 391 ; *Sheo Singh* v *Raghubans Kunwar* (7), *Ran Bijai Bahadur Singh* v. *Jagatpal Singh* (8), *Jagdish Bahadur* v *Sheo Partab Singh* (9), clause (11) of section 22 of Act I of 1869, *Maharajah Pertab Narain Singh* v *Maharanee Subhao Koer* (10), *Haidar Ali* v *Tasadduk Rasul Khan* (11), *Bhai Narindar Bahadur Singh* v. *Achal Ram* (12) and *Brij Indar Bahadur Singh* v. *Jagatpal Singh* (13) in which the same estate was in question as in *Jagdish Bahadur* v *Sheo Partab Singh* (14)

*Ross* replied citing Maine s Hindu law, 7th edition, pages 742, 743, paragraphs 545, 546 ; and *Lal Sitla Bakhsh Singh* v. *Janki Kuar* (15) and *Abdul Karim Khan* v *Hari Singh* (16) from the Select Cases in the Judicial Commissioner's court, 2nd edition by

(1) (1883) I L R, 10 Calc 511, L R, 11 I A, 51
(2) (1893) I L R 20 Calc, 649 (652), L R, 20 I A, 77 (79)
(3) (1899) I L R, 27 Calc, 344, L R, 26 I A, 194
(4) (1877) L R, 5 I A., 1
(5) (1890) I L R 18 Calc 111 (114), I L R, 17 I A, 173 (174)
(6) (1901) I L R, 23 All., 369, L R, 28 I A., 100
(7) (1905) I L R., 27 All., 634 (650), L R., 32 I A., 203 (213)
(8) (1890) I L R 18 Calc, 111, L R., 17 I A., 173.
(9) (1901) I L R., 23 All., 369 (381); L R, 28 I A, 100 (107)
(10) (1877) I L R, 3 Calc., 626; L R., 4 I A, 228 (234)
(11) (1890) I L R, 18 Calc., 1 (3), L R, 17 I A, 82 (87, 88)
(12) (1893) I L R, 20 Calc., 649 L R, 20 I A., 77.
(13) (1877) L R., 5 I A., 1.
(14) (1901) I L R., 23 All., 369; L R., 28 I A., 100
(15) (1874) Case No 10, page 7.
(16) (1890) Case No 171, page 12[?].

Judge will have binding effect upon all parties and persons interested in the trust property. Section 1 of the second schedule to the Civil Procedure Code is to be read subject to section 89 of the Code

Even if the matter could be referred to arbitration and the award were valid, the application to file the award should have been made to the District Judge and not to the Subordinate Judge.

Dr *Tej Bahadur Sapru*, in reply :—

The case in I L R, 30 All, 137, can be distinguished It was a case under the Guardians and Wards Act That Act provides specifically that the court is not bound to appoint the one or the other of the disputants, but that the chief consideration should be for the welfare of the minor. The welfare of the minor being laid down by law to be the supreme test for the appointment of a guardian, the decision on that matter should be the judgement of the court, and not of a third party But even under the Guardians and Wards Act it is only when there is a dispute between two persons and the court is moved that the court can take action under that Act and appoint a proper guardian It cannot, of its own motion, take it upon itself to appoint a guardian or administer the estate of a minor

Next, as regards the applicability of the Muhammadan Law The procedure prescribed by that law for many subjects is not followed in British India; and the question as to what court is to decide a matter is a question of procedure alone

Then as regards the scope of section 92. That section has no application where a party seeks to enforce a private right although that private right may have some relation to public charity Before section 92 can apply, it is necessary for the party invoking its aid to show the existence of certain conditions, the first being that there has been a breach of trust The conditions of the applicability of section 92 are set forth in Ameer Ali and Woodroffe: *Code of Civil Procedure*, pages 348, 351, 358, and also in *Budree Das Mukim* v *Chooni Lal Johurry* (1) and *Sir Dinsha Maneckji Petit* v *Sir Jamsetji Jijibhai* (2).

(1) (1906) I L R. 33 Calc, 789, 799, 807, 808

(2) (1909) I L R, 33 Bom 509, 523.

succeed were the rule adopted not that of lineal primogeniture but of nearness in degree The issue in this case is which of these rules governs the rights of the parties

The case was treated by the Courts below and in argument at one of great general importance as determining the rules of intestate succession to the Taluqdars of Oudh, and it is no doubt true that, while both parties appeal to the provisions of the Oudh Estates Act, 1869, an apparently serious repugnancy arises on a contrast of the provisions of section 8 and section 22 of that Statute

By the 8th section it is provided that —

Within six months after the passing of this Act the Chief Commissioner of Oudh, subject to such instructions as he may receive from the Governor General of India in Council, shall cause to be prepared six lists, namely —"

and then follow the lists in their order

It is an admitted fact in the present case that Raghuraj Singh, whose succession is in question, had in 1860 the Rajpur Keotana Estate conferred upon him, and that his name was entered in List 5 as well as List 1. List 1 was of a general character, namely —

1st A list of all persons who are to be considered taluqdars within the meaning of this Act"

List 5 was as follows —

"5th A list of the grantees to whom sanads or grants may have been or may be given or made by the British Government up to the date fixed for the closing of such list declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture"

Up to that point their Lordships do not think that any substantial difficulty would arise in the case What appears to be contended for is that some other rule of primogeniture than the rule of lineal primogeniture should be applied In the first Court a certain custom was appealed to, to make clear or illustrate what variation from lineal primogeniture was meant, but no success attended that plea and it was not maintained at their Lordship's Bar In their opinion, the language of the sanad emanating from the British Authority was simply language conveying the ordinary meaning of the word "primogeniture" in the Law of England

the expenses of other good deeds" Regarding the trusteeship of the endowment, he in his will said —"I covenant that as long as I am alive I shall continue to spend with my own hands and of my own authority, the income derived from the said villages for the sake of God, and that after me one of my male descendants who is qualified shall continue to spend it generation after generation in the way and manner in which I was doing"

During his lifetime, Ghulam Chishti Khan continued to manage the *waqf* property After his death, his son, Abdul Karim Khan, succeeded to the trusteeship Abdul Karim Khan died on the 31st August, 1908 Muhammad Ibrahim Khan the plaintiff, Abdul Majid Khan and Abdul Said Khan, the defendants, could not agree as to who should be the trustee of the property Under a registered agreement of the 19th February, 1909, the parties referred their dispute to arbitration The arbitrators made their award, and the plaintiff under section 20, schedule II of the Code of Civil Procedure, applied to file the award in court Objections were taken by the defendants The learned Subordinate Judge in his order, dated the 12th August, 1909, came to the conclusion that the award was void in law and disallowed the application with costs The plaintiff has appealed from that order to this Court At the hearing of the appeal an objection is taken on behalf of the respondents that the question of succession to the trusteeship of such a charity as had been created by the will of Ghulam Chishti Khan, could not be referred to arbitration, and that the learned Subordinate Judge had therefore no jurisdiction to entertain the application for filing the award in court This point was not taken before the court below, but as it is a very important point and will affect the administration of charities, we granted permission to argue the point

For a satisfactory decision of the question raised, the following points have to be determined —

Is the charity created by the will of Ghulam Chishti Khan a public or a private charity?

If it is a public charity, what are the prerogatives of the Crown with reference to it?

of the taluqdar's religion and tribe, and it is maintained that in these circumstances the Statute, and the Statute alone must govern

The main authority for this proposition is the case of *Brij Indar Bahadur Singh* v *Ranee Janki Koer, Lal Shunkur Bux* v *Ranee Janki Koer* and *Lal Seetla Bux* v *Ranee Janki Koer* (1) in which Sir Barnes Peacock said —

As regards the success on their Lordships are of opinion that the limitation in the sanad was wholly superseded by Act I of 1869 and that the rights of the parties claiming by descent must be governed by the provisions of section 22 of that Act By that section it was enacted that if any such taluqdar whose name should be inserted in the second third or fifth of the lists mentioned in section 8 or his heir or legatee should die intestate such estate should descent in manner therein described

Now, it has to be observed that, with reference to all the authorities cited, no one of them has decided the question now submitted on this appeal or any question as to Lists 3 or 5 The case just referred to was a case in which the name of the taluqdar was entered upon Lists 1 and 2

On the point of whether the estates of taluqdars must, for the purposes of intestate succession, be treated as impartible, their Lordships hold that the matter is definitely settled by decision In the appeal of *Dewan Ran Bijai Bahadur* v *Rae Jagatpal Singh* and *Rae Bisheshar Baksh Singh* v *Dewan Ran Bijai Bahadur Singh* and *Rae Jagatpal Singh* (2), Sir Barnes Peacock, delivering the judgement of the Privy Council, said —

A question might arise upon the construction of clause (11) of section 22 whether the estate descended as an impartible estate Their Lordships are of opinion looking to the provisions of Act I of 1869 List 2 section 8 and section 22 that it was the intention of the Legislature that the estate should descend as an impartible estate

Again, in *Jagdish Bahadur* v *Sheo Partab Singh* (3) the same law was affirmed in terms in the judgement of Lord Davey and the point taken to be concluded by authority

It cannot, accordingly, in the first place be denied that, giving full effect to Act I of 1869, the succession to a taluq must be to an impartible estate, and that, whether the estate "ordinarily devolved upon a single heir," to quote the language

(1) (1877) L. R. 5 I. A, 1. (2) (1890) L. R 17 I. A, 173; I L. R. 18 Calc., 111
(3) (1901) I L. R. 23 All., 369 L. R., 28 I. A., 100

us and, to the use of the word 'charitable' in the particular Act we are construing, I would say, without attempting an exhaustive definition or even description of what may be comprehended within the term 'charitable purpose,' I conceive that the real ordinary use of the word 'charitable' as distinguished from any technicalities whatsoever, always does involve the relief of poverty"

Applying the tests as set out above, to the purposes for which the endowment was made by Ghulam Chishti Khan, there can be no doubt that the *waqf* created a trust for public purposes of a charitable nature

If we look at the question from the standpoint of the Hanafi law, the purposes will, no doubt, be regarded 'as charitable' inasmuch as the term 'charity' under that law has a more general import than under the English law, see I L R, 19 Calc 412, at page 434

The purposes for which the *waqf* was made, being of the nature of a public charity, it is necessary to show what the prerogative of the Crown with respect to such charities is We find it stated in Tudor on Charities, page 362, 4th edition, in the following terms — It is the prerogative of the Crown to protect the interests of infants, lunatics and charities In the case of charities, Lord Eldon lays down the law as follows —* 'It is the duty of the King as *parens patriæ*, to protect property devoted to charitable uses, and that duty is executed by the officer who represents the Crown for all forensic purposes On this foundation rests the right of the Attorney General in such cases to obtain by information the interposition of a Court of Equity This duty of the King falls under the direction of the Court of Chancery, being part of the general equitable jurisdiction And, inasmuch as charitable trusts are matters which concern the public it is one of the functions of the Attorney General, representing the King in his character of *parens patriæ*, and not by virtue of any estate or interest he has in

* *A G v Brown* (1818) 1 Swanst 291 and see *Wellbeloved v Jones* (1822) 1 S & S 43 *A G v Compton* (1842) 1 Y & C C C 427 *A G v Magdalen College Oxford* (1854) 18 B 211

But it does not appear that the ordinary law of the religion and tribe would have fixed upon any different person as entitled to succeed where the "rule of primogeniture" had been acknowledged rule of the succession—any different person from the respondent and plaintiff in the suit, who has succeeded under the judgement of the Judicial Commissioner.

If reference be made to section 23, the result reached is the same. That section provides that

"Except in the cases provided for by section 22, the succession to all property left by taluqdars and grantees, and their heirs and legatees dying intestate, shall be regulated by the ordinary law to which members of the intestate's religion and tribe are subject"

This expression, viz, that

"the success on shall be regulated by"

is the same form of words as that employed in the List 5 of section 8 which declared of, *inter alia*, the present succession that it

"should be regulated by the rule of primogeniture"

This declaration and condition of the sanad being part of the original title to the property is an essential part of that regulation of the ordinary law of the religion and tribe and would have been respected accordingly.

For these reasons their Lordships will humbly advise His Majesty that the judgement passed by the Court of the Judicial Commissioner of Oudh, dated the 5th July, 1907, is correct and that the appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the appellant:—*Barrow, Rogers & Nevill.*

Solicitors for the respondent:—*T. L. Wilson & Co.*

J. V. W.

It is also to be borne in mind that section 92 of the present Code (V of 1908), which is in part borrowed from Romilly's Act, 52 Geo III c 101, enacts that where the direction of the Court is necessary for the administration of any trust created for public purposes of a charitable, or religious nature, two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General may institute a suit for the purposes specified in the section, and this shows that the State has an interest in public charities and their proper administration, and that the succession of a trustee to his public duty is a post which ought not to be filled up without the sanction of the authorities to whom the State delegates its powers in this behalf The tenor of section 92 of the Code points in the direction that the post could only be filled up by the sanction of the principal Civil Court of original jurisdiction or any other court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situate In this connection it may be argued that a breach of trust is a condition precedent for the exercise of the power vested in the principal Court of original jurisdiction, but there is no force in this It is sufficient that there be a public trust and that the direction of the Court be necessary for its administration See *Raghubar Dial* v *Kesho Ramanuj* (1), in which STRAIGHT, J, at page 22 is reported to have said —" Now it is not necessary, if I read that section aright, that there should be any breach of trust but it is sufficient that there should be a public religious trust and the direction of the Court is considered necessary for the administration of that trust " This view has been adopted by the Judges of the Calcutta High Court in *Lutif un nissa Bibi* v *Nazir un Bibi* (2) See also *Neti Rama Jogiah* v *Venkatacharulu* (3), the first portion of the head note of which is as follows —" A suit for the appointment of a new trustee to a temple on the ground that the defendants are not lawful trustees, is a suit under section 539 (*c*) of the Civil Procedure Code being comprised in the

(1) (1888) I L R 11 All 18 (2) (1884) I L R 11 Calc, 33
(3) (1902) I. L. R 26 Mad 450

But it does not appear that the ordinary law of the religion and tribe would have fixed upon any different person as entitled to succeed where the "rule of primogeniture" had been acknowledged rule of the succession—any different person from the respondent and plaintiff in the suit, who has succeeded under the judgement of the Judicial Commissioner.

If reference be made to section 23, the result reached is the same. That section provides that

"Except in the cases provided for by section 22, the succession to all property left by taluqdars and grantees, and their heirs and legatees dying intestate, shall be regulated by the ordinary law to which members of the intestate's religion and tribe are subject"

This expression, viz, that

"the succession shall be regulated by"

is the same form of words as that employed in the List 5 of section 8 which declared of, *inter alia*, the present succession that it

"should be regulated by the rule of primogeniture"

This declaration and condition of the sanad being part of the original title to the property is an essential part of that regulation of the ordinary law of the religion and tribe and would have been respected accordingly.

For these reasons their Lordships will humbly advise His Majesty that the judgement passed by the Court of the Judicial Commissioner of Oudh, dated the 5th July, 1907, is correct and that the appeal should be dismissed with costs

*Appeal dismissed.*

Solicitors for the appellant:—*Barrow, Rogers & Nevill.*

Solicitors for the respondent:—*T. L. Wilson & Co.*

J. V. W.

same book on page 32 we find the following passage —"It may here be proper to remark that in suits in equity respecting charity proper the Court would not permit a reference, however advisable such a course might seem, unless the Attorney General gave his consent" *

It is further contended that Act XX of 1863, section 16 allows certain matters to be referred to arbitration This is also a mere analogy and not sufficient to support the contention of the learned advocate The learned advocate also argues that whenever a party can institute a suit of a civil nature in a court, that party can also refer that matter to arbitration No authority has been cited in support of this proposition and in our opinion it is not a universal proposition that, whenever a suit can be instituted in a Civil Court, the subject matter of that suit can also be referred to arbitration An arbitrator is a tribunal chosen by the consent of parties, and unless the law allows them to choose such a tribunal in respect of certain classes of cases, they have no power to do so

Certain remarks made by WOODROFFE J, in *Budree Das Mukim* v *Chooni Lal Johurry*, (1) are relied on by the learned advocate, but these remarks only deal with cases which are within the scope of section 539 of the Code, and have nothing to do with the question whether or not a dispute as to the right of succession to the management of property made *waqf* for public charitable purposes can be referred to arbitration

In *Sir Dinsha Manekji Petit* v *Sir Jamsetji Jijibhai* (2), DAVAR, J, is reported to have said —"Mr Mullah in his commentary on section 539, Civil Procedure Code, 2nd Edition, deduces at page 487 of his book, the following proposition as the result of the authorities he cites there—'suits brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right, are not within the section' I am in entire accord with this proposition This is undoubtedly a suit for the purpose of remedying an

* *A G* v *Fea* 4 Madd 274 *A G* v *Hewitt* 9 Ves 232 *Prior* v *Hembrow* 8 M and W 873 10 L J Ex 371

(1) (1903) I L R, 33 Calc 748 and 857 (2) (1908) I L R 33 Bom, 509

# REVISIONAL CIVIL

*Before Mr Justice Karamat Husain and Mr Justice Chamier*

MUHAMMAD AYAB (APPLICANT) *v* MUHAMMAD MAHMUD AND OTHERS (OPPOSITE PARTIES )*

*Civil Procedure Code* (1908), *section* 115—*Order granting an application for leave to sue in formâ pauperis*—*Revision*

*Held* that no application in revision will lie to the High Court from an order granting an application for leave to sue in *formâ pauperis* *Harsaran Singh* v *Muhammad Raza* (1) and *Bhulneshri Dat* v *Bidiadis* (2) followed *Faiz Muhammad Khan* v *Aziz un nissa* (3) *Musammat Changia* v *Joti Prasad* (4), *Ghulam Shabbir* v *Dwarka Prasad* (5) and *Debi Das* v *Ejaz Husain* (6) referred to

AN application for leave to file a suit *in formâ pauperis* was made to the Subordinate Judge of Allahabad and was granted by him The defendant applied to the High Court in revision, praying that the Subordinate Judge's order might be set aside upon the ground that there was no valid presentation of the application for leave to sue *in formâ pauperis* and that the court below was therefore bound to have rejected it At the hearing a preliminary objection was taken by the plaintiffs to the effect that the Subordinate Judge's order, being an interlocutory order, was not open to revision

Babu *Jogindro Nath Chaudhri* (with him the Hon'ble Pandit *Moti Lal Nehru* and Babu *Satya Chandra Mukerji*), for the applicant

Dr. *Satish Chandra Banerji* (with him Maulvi *Muhammad Ishaq*), for the opposite party

KARAMAT HUSAIN, J —This was an application to revise an order passed by the learned Subordinate Judge of Allahabad granting an application to sue *in formâ pauperis* and the court below was bound to reject it At the hearing of this revision a preliminary objection is taken that inasmuch as the order is an interlocutory order, it cannot be revised In support of this contention reliance is placed on *Harsaran Singh* v *Muhammad Raza* (1) and on *Bhulneshri Dat* v *Bidiadis* (2) In the

---

* Civil Revision No. 101 of 1909

(1) (1881) I. L. R 4 All 91

(2) Weekly Notes 1882 p 69

(3) Weekly Notes 1899, p. 219

(4) Civil Revision No. 24 of 1910 decided May 24th 1910

(5) (1895) I. L. R., 18 All., 163

(6) (1905) I. L. R., 28 All 72

fee of Rs. 10 on the memorandum of appeal. The office reported that *ad valorem* fee should be charged.

The appellants objected to the office report on the following grounds:—

(1) Because the preliminary decree under form 21, schedule 1, No. 21, of Civil Procedure Code, 1908, being only a declaratory decree and the only relief prayed in appeal being to set aside the declaration that the appellants are sharers of 6 annas with defendant No. 1 in the disputed firm, a fixed fee of Rs. 10 was sufficient on the memorandum of appeal under schedule II, No. 17 (iii), of the Court Fees Act.

(2) Because the object of the change introduced into the Civil Procedure Code of 1908, was to compel the aggrieved party to appeal against the preliminary decree at a moderate expense.

(3) Because, under the Civil Procedure Code of 1908, there is necessarily more than one appeal from decree (preliminary and final) in the same suit in certain cases; it was never intended by the Legislature by the change in the law that the parties should be obliged to pay *ad valorem* court fee upon memoranda of appeals twice over.

(4) Because, under any circumstances, it is not possible to estimate at a money value the subject-matter in dispute, and a fixed fee was payable under column 17(iv), schedule II of the Court Fees Act.

The stamp reporter reported as follows:—

"In continuation of my report, dated the 26th January, 1910, I beg to submit a few more points for consideration of the Taxing Officer.

"The change in procedure introduced by the new Code of Civil Procedure does not affect the provisions of the Court Fees Act except in so far as the Legislature has expressly amended or repealed them (*vide* schedules IV and V of Act No. V of 1909). Section 7, clause iv of Act VII of 1870, which governs the present case, does not find its place in any of the said schedules. Under the old Code too, in suits for dissolution of partnership, the court had to pass a preliminary decree declaring the rights of parties and laying down the lines on which the account had to be taken (*vide* section 215 and Form No. 132, schedule IV of Act No. XIV of 1882), please see also the case of *Biswa Nath Chaki* v. *Bani Kanta Dutta*(1) and it was open to the parties to appeal against the preliminary decree as well as against the final decree: both had to be charged with *ad valorem*

(1) (1896) I. L. R., 23 Calc., 406.

am not prepared to subscribe to the view that no proceeding can be a "case" unless it terminates in a decree But giving the word "case" the widest meaning that was given to that word in section 622 of the Code of 1882, I am unable to hold that the order against which this application for revision is presented decided any "case" It appears to me that there is a clear distinction between the case of an application for permission to sue or appeal *in formâ pauperis* being dismissed or rejected and the case in which a similar application is allowed. In the former it may be said that the case had been decided, while in the latter the order appears to be merely interlocutory

BY THE COURT —The application is rejected with costs

*Application rejected*

## APPELLATE CIVIL

*Before Sir John Stanley Knight Chief Justice and Mr Justice Griffin.*

BATUL KUNWAR (DEFENDANT) *v* MUNNI LAL (PLAINTIFF) *

*Code of Civil Procedure* (1882) *section 43—Portion of claim—Intentional omission—Civil Procedure Code* (1908) *order II rule* 2 (2)

G who was the tenant of a holding died leaving a mother and a daughter both of the same name The plaintiff sued the mother as representing G for arrears of rent for 1313 Fasli and obtained an *ex parte* decree In respect of the year 1314 he sued the daughter and obtained a decree The decree in respect of 1313 was set aside and at the rehearing the daughter was made a party It was found that at the time the plaintiff brought the suit in respect of 1314 he was not aware that the daughter was the tenant in 1313 *Held* that the plaintiff having no knowledge when he brought his suit in respect of 1314 that the daughter was the tenant in 1313 could not be said to have omitted to sue in respect of that year and the suit for 1314 was not barred by the provisions of section 43 of the Code of Civil Procedure (1882) *Amanat Bibi* v *Imdad Husain* (1) referred to

THE facts of the case were as follows —

One Gokul Singh an agricultural tenant, died leaving him surviving his mother and a daughter, both of the name of Batul Kunwar They continued to reside on the holding of Gokul Singh On the 17th of July, 1906, the plaintiff sued the mother for the rent of the year 1313 F and obtained an *ex parte* decree

* Appeal No. 1 of 1910 under section 10 of the Letters Patent.

(1) (1888) L R., 15 I. A 106 I. L. R 15 Calc 800

of appeal refers only to jurisdiction and not to court fee. Although the Suits Valuation Act, section 8, provides that where with certain exceptions, the court fee is payable *ad valorem*, the valuation for the purpose of court fees and jurisdiction shall be the same, but (*a*) that Act was passed on 11th of February, 1887, and did not repeal any of the provisions of the Court Fees Act, (*b*) made a special provision for appeals (*vide* section 12), and (*c*) section 8 has nothing to do with cases in which the court fee payble is not *ad valorem*

"As to section 7 (*f*) of sub clause iv, it appears that it is inapplicable to the present appeal as there is no question of accounts involved in it In some cases it has, no doubt, been held that every suit for dissolution of partnership is a suit for accounts, probably because in the second stage of such a suit accounts are generally adjusted But in the first stage when only the rights of the parties are to be declared, such a suit could hardly be treated a suit for accounts within the meaning of section 7 (iv) (*f*) of the Court Fees Act The plaintiff was concerned with both stages, but the defendants appellants are not concerned with the second at all

'As the new Civil Procedure Code makes it compulsory for the aggrieved party to appeal from the preliminary decree, if he likes to appeal at all with regard to the matters dealt with in the preliminary decree, it is really a great hardship upon the litigants, to be obliged to pay *ad valorem* court fee twice over, the point requires careful consideration as there has, up to this time, been no ruling under the new Code upon this question

'Even if the valuation put upon the appeal be wrong or in contravention of the Suits Valuation Act that cannot affect the question of court fee.

'No change has of course been introduced in the Court Fees Act so far as the present question is concerned, probably because it was quite unnecessary inasmuch as article 17 of that Act is wide enough to provide for cases not expressly dealt with any other portion of the Act The whole question is by no means quite free from difficulty and it would be a great advantage to have the matter authoritatively set at rest"

The taxing Officer referred the case to the taxing Judge with the following report:—

"This is a suit for dissolution of partnership which for purposes of court fees is treated as a suit for accounts and dealt with under section 7 iv (*f*) of the Court Fees Act

'The facts bearing on the point for decision are simple The plaintiff sued the present appellants, amongst others, for dissolution of partnership The court of first instance passed a preliminary decree, declaring the present appellants to be liable for 6/16th of the profits of the partnership They come in appeal against this decree alleging that they have no interest in the partnership at all and asking this Court to set aside, as far as they are concerned, the preliminary decree of the court of first instance The question is whether their appeal should be stamped *ad valorem* or should bear the fixed fee of Rs 10

"Under the provisions of the new Code of Civil Procedure (section 97 and order 20, rule 5) it is necessary to take a separate appeal against a preliminary decree such as this. If this is not done, objection cannot be subsequently taken

of that suit That application was rejected on the ground that she was not a party to the suit. Upon this Batul Kunwar, the mother, applied for a rehearing of the case on the 27th March, 1907, and the rehearing was granted Then the plaintiff applied to have Batul Kunwar, the daughter, made a defendant, and she was added as such on the 17th of May, 1907, and a notice was served on her on the 27th of May, 1907. The result was that the court gave the plaintiff a decree as against Batul Kunwar, the daughter This decision was upheld by the lower appellate court, whereupon a second appeal was preferred to the High Court with the result that the decision of the lower court was affirmed. The present appeal under the Letters Patent has now been preferred, and the sole ground on which the appeal is supported is that the plaintiff was aware on the 10th of January, 1907, when he instituted his suit for the arrears of rent for 1314 Fasli, that Batul Kunwar, the daughter, was tenant of the holding and omitted to sue her for the rent of 1313 Fasli It appears to us that the fallacy in the argument in support of the appeal lies in the fact that there is nothing to show that the plaintiff had any knowledge, that Batul Kunwar was tenant in the year 1313 Fasli. On the contrary, the fact that he had instituted a suit against Batul Kunwar, the mother, as tenant on the 17th of July, 1906, and obtained a decree against her *ex parte* shows that he had not any such knowledge. It is true that on the 10th of January, 1907, he was aware that Batul Kunwar, the daughter, was or claimed to be then tenant, but from this we cannot infer that she was tenant during the previous year. A plaintiff is not under such circumstances barred by the provisions of section 43 of the former Code of Civil Procedure, corresponding to order II, rule 2, sub-section 2 of Act V of 1908. That section provides that "if a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished" If, at the time of the institution of the suit for the arrears of rent for 1314, viz, the 10th of January, 1907, the plaintiff was not aware that Batul Kunwar, the daughter, was the tenant, he cannot be said to have omitted to sue for the rent of 1313 Fasli, within the meaning of the

of first instance has passed a preliminary decree. The appellants were impleaded as defendants, and the court held that their share in the partnership amounted to 6/16 Their case is that they have no interest whatsoever in the partnership. It is argued on their behalf that all that they seek in this appeal is a declaration that they have no interest whatever in this partnership, and that the appeal therefore comes under article 17, clause iii or clause vi of schedule II of the Court Fees Act The Taxing Officer, however, is of opinion that the appeal should bear an *ad valorem* fee according to the amount at which the relief sought is valued in the memorandum of appeal It has been the practice of the Court in the past to take *ad valorem* fees in the cases of appeals from preliminary decrees in suits of the nature of the present one The fact that it is now compulsory on the appellants to appeal against the preliminary decree passed in such a suit does not affect the matter of court fees in any way. Section 7 of the Court Fees Act distinctly lays down that the amount of fee payable shall be computed in suits for accounts according to the amount at which the relief sought is valued in the plaint or memorandum of appeal The language of this section seems to me quite plain Whether the appeal be one from a preliminary decree or a final decree, it seems to me impossible to hold otherwise than that an *ad valorem* fee must be paid according to the amount at which the relief sought is valued in the memorandum of appeal In the present case the appellants have valued their relief at Rs 21 698 13 They must, therefore, pay an *ad valorem* fee on the above amount, or if the memorandum of appeal is amended, on the amount entered according to such amendment

*Reference answered accordingly*

of that suit That application was rejected on the ground that she was not a party to the suit Upon this Batul Kunwar, the mother, applied for a rehearing of the case on the 27th March, 1907, and the rehearing was granted Then the plaintiff applied to have Batul Kunwar, the daughter, made a defendant, and she was added as such on the 17th of May, 1907, and a notice was served on her on the 27th of May, 1907 The result was that the court gave the plaintiff a decree as against Batul Kunwar, the daughter This decision was upheld by the lower appellate court, whereupon a second appeal was preferred to the High Court with the result that the decision of the lower court was affirmed. The present appeal under the Letters Patent has now been preferred, and the sole ground on which the appeal is supported is that the plaintiff was aware on the 10th of January, 1907, when he instituted his suit for the arrears of rent for 1314 Fasli, that Batul Kunwar, the daughter, was tenant of the holding and omitted to sue her for the rent of 1313 Fasli It appears to us that the fallacy in the argument in support of the appeal lies in the fact that there is nothing to show that the plaintiff had any knowledge, that Batul Kunwar was tenant in the year 1313 Fasli On the contrary, the fact that he had instituted a suit against Batul Kunwar, the mother, as tenant on the 17th of July, 1906, and obtained a decree against her *ex parte* shows that he had not any such knowledge It is true that on the 10th of January, 1907, he was aware that Batul Kunwar, the daughter, was or claimed to be then tenant, but from this we cannot infer that she was tenant during the previous year A plaintiff is not under such circumstances barred by the provisions of section 43 of the former Code of Civil Procedure, corresponding to order II, rule 2, sub section 2 of Act V of 1908 That section provides that "if a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished" If, at the time of the institution of the suit for the arrears of rent for 1314, viz, the 10th of January, 1907, the plaintiff was not aware that Batul Kunwar, the daughter, was the tenant, he cannot be said to have omitted to sue for the rent of 1313 Fasli, within the meaning of the

RICHARDS and TUDBALL, JJ.—The facts out of which this appeal has arisen are shortly as follows:—Muhammad Ishaq Khan made an application in the Revenue Court for partition. Objections were filed by the appellant here, Muhammad Nasar-ullah Khan. The purport of these objections was that there had already been a private partition between the parties of a great portion of the property, and he contended that this private partition should be paid regard to and that the lands which had been allotted to him by this private partition should be maintained in his possession. These objections were disallowed by the Assistant Collector in charge of the partition by an order of the 15th December, 1906. There was an appeal to the Collector who made an order on the 18th March, 1907. In this order he points out that he has gone carefully into the whole matter. He says that there was a private partition, and that he could find no trace of the said private partition being merely of a temporary nature. He then proceeds to say:—"I come to the same conclusion as Babu Mahesh Prasad, and accepting the appeal direct that the lots of the private partition regarded in this case as the severalty of their owners." We may mention that it was quite immaterial whether the arrangement between the parties was temporary or permanent. In making the partition of property it is the duty of a Revenue Court as far as possible, to allot lands held in severalty to the persons so holding them, and of course it follows that any deficiency should be made good out of the common land (*vide* sections 117 and 125 of the Land Revenue Act III of 1901). From the order of the Collector an appeal was preferred to the District Judge who reversed the order of the Collector. The present appeal is taken on the ground that no appeal lay to the District Judge. In our opinion this plea is well founded. The case of *Tulsi Rai* v. *Gate Ram Rai* (1) is directly in point. The case of *Muhammad Jan* v. *Sadanand Pande* (2) relied on by the learned District Judge is quite distinguishable. There one of the parties expressly made claim to proprietary title based on adverse possession. We may mention that one of the learned Judges who decided the case of *Tulsi Rai* v. *Gate Ram Rai* was also a party to the case of *Muhammad Jan* v. *Sadanand Pande*

(1) Weekly Notes 1901 p. 2 5. (2) (1906) I. L. R., 28 All., 394.

decreed the claim. The defendants Nos. 1 to 4 appealed to the High Court.

Mr. *S. A. Haidar* (with him Maulvi *Muhammad Ishaq* for whom Babu *Sital Prasad Ghosh*), for the appellants, contended that the transfer in favour of the plaintiff was illegal, having been made after the coming into operation of the Agra Tenancy Act. He further submitted that those occupancy tenants who had acquired their rights prior to the passing of Act II of 1901, could not transfer their rights after the coming into force of the said Act, and consequently the mortgagee of an occupancy holding could not legally transfer his rights when the said Act was in force. He relied on *Banmali Pinde* v. *Bisheshar Singh* (1) and on *Harnandan Rai* v. *Nakchedi Rai* (2).

Mr. *M. L. Agarwala* (with him Munshi *Govind Prasad*), for the respondents, submitted that the transfer was a perfectly legal one. He relied on *Babu Lal* v. *Ram Kali* (3) and on section 6 of Local Act No. 1 of 1904 (General Clauses Act).

Mr. *S. A. Haidar* was heard in reply.

STANLEY, C. J. and GRIFFIN, J.—This appeal arises out of a suit for redemption of a sub-mortgage. One Balgobind Rai was the occupancy tenant of a holding. He, on the 20th of July, 1881, mortgaged this holding to one Raj Kumar Lal, and on the 23rd of November, 1899, Raj Kumar Lal executed a sub-mortgage of a portion of the mortgaged property in favour of the defendants, and again on the 18th of July, 1904, he executed a further mortgage of the same property in favour of the defendants. Then, on the 9th of July, 1907, Raj Kumar transferred his mortgage security to the plaintiff. The plaintiff instituted the suit out of which this appeal has arisen for the redemption of the sub-mortgages executed in favour of the defendants by Raj Kumar, his predecessor in title. The court of first instance dismissed the plaintiff's claim, but on appeal the lower appellate court reversed the decision of the court below and gave a decree in favour of the plaintiff. Against this decree the present appeal has been preferred, and the only contention raised before us on behalf of the appellants is that which is stated in the second paragraph of

(1) (1906) I. L. R., 29 All. 129. (2) Weekly Notes, 1906 p. 202.
(3) Weekly Notes, 1905, p. 28.

RICHARDS and TUDBALL, JJ.—The facts out of which this appeal has arisen are shortly as follows :—Muhammad Ishaq Khan made an application in the Revenue Court for partition. Objections were filed by the appellant here, Muhammad Nasar-ullah Khan. The purport of these objections was that there had already been a private partition between the parties of a great portion of the property, and he contended that this private partition should be paid regard to and that the lands which had been allotted to him by this private partition should be maintained in his possession. These objections were disallowed by the Assistant Collector in charge of the partition by an order of the 15th December, 1906. There was an appeal to the Collector who made an order on the 18th March, 1907. In this order he points out that he has gone carefully into the whole matter. He says that there was a private partition, and that he could find no trace of the said private partition being merely of a temporary nature. He then proceeds to say :—"I come to the same conclusion as Babu Mahesh Prasad, and accepting the appeal direct that the lots of the private partition regarded in this case as the severalty of their owners." We may mention that it was quite immaterial whether the arrangement between the parties was temporary or permanent. In making the partition of property it is the duty of a Revenue Court, as far as possible, to allot lands held in severalty to the persons so holding them ; and of course it follows that any deficiency should be made good out of the common land (*vide* sections 117 and 125 of the Land Revenue Act III of 1901). From the order of the Collector an appeal was preferred to the District Judge who reversed the order of the Collector. The present appeal is taken on the ground that no appeal lay to the District Judge. In our opinion this plea is well founded. The case of *Tulsi Rai* v. *Gate Ram Rai* (1) is directly in point. The case of *Muhammad Jan* v. *Sadanand Pande* (2) relied on by the learned District Judge is quite distinguishable. There one of the parties expressly made claim to proprietary title based on adverse possession. We may mention that one of the learned Judges who decided the case of *Tulsi Rai* v. *Gate Ram Rai* was also a party to the case of *Muhammad Jan* v. *Sadanand Pande*

(1) Weekly Notes, 1901, p. 235. (2) (1906) I. L. R., 29 All., 391.

ground that Musammat Phulmani had only a limited estate and that the plaintiff had failed to prove that the mortgage was made for legal necessity The plaintiff appealed to the High Court

Pandit *Baldeo Ram Dave* (with him Munshi *Iswar Saran*), for the appellant

Munshi *Govind Prasad*, for the respondents

STANLEY, C J, and GRIFFIN, J —This is an untenable appeal The plaintiff sued to enforce payment of a debt secured by a mortgage bond of the 31st of January, 1896, executed by one Musammat Phulmani, deceased, and her daughter Musammat Pan Mati The court of first instance decreed the claim, but upon appeal the decision of that court was reversed and the plaintiff's suit dismissed on the ground that Musammat Phulmani had only a limited interest in the mortgaged property, namely, a widow's estate, and that the plaintiff had failed to prove that the mortgage in suit was made for legal necessity

We think that this decision is correct The property formerly belonged to Beni, and upon his death it descended to his widow, Musammat Chunna After her death it came to Musammat Phulmani Musammat Phulmani had two daughters, namely, Musammat Pan Mati and Musammat Parbati Musammat Parbati has two minor sons, the defendants, Sundar Pande and Ram Piare Pande According to the Hindu law Musammat Parbati and Musammat Pan Mati, the daughter's daughters of the owner Beni could not inherit his property Consequently Musammat Pan Mati had no interest in the property which she could mortgage The mortgage not having been shown to have been made for legal necessity, it is clear that no interest passed to the mortgagee beyond the life estate of Musammat Pulmani But it is contended that this mortgage ought to prevail in the absence of reversionary heirs to dispute its validity It is said that there are no reversionary heirs, but this is not the case It has been held by a Bench of this Court, and we think rightly, that under the Mitakshara the son of a daughter's daughter is an heir In the case of *Ajudhia v Ram Sumer Misir* (1) our brothers BANERJI and TUDBALL held that a daughter's daughter's son is a

(1) (1909) I L R., 31 All., 454.

in favour of the defendant a decree for the amount which was found due to him after settlement of account" He did not, however pay the court fees on the amount claimed The District Judge dismissed the plaintiff's appeal, and finding that the sum of Rs 1 887 was due to the defendant, gave him a decree for that amount conditional on his paying the requisite court fees in respect of both courts This condition was fulfilled The plaintiffs thereupon appealed to the High Court against the decree passed in defendant's favour

The Hon'ble Pandit *Sundar Lal* (with him The Hon'ble Pandit *Moti Lal Nehru*) for the appellants, contended that the court should not have passed a decree in the defendant's favour as the defendant had not prayed for a decree or claimed a set off The question was whether the court could rightly grant the defendant a decree when he had not claimed a set off under the provisions of section 111, Civil Procedure Code (1882) or paid the requisite court fee with the written statement He cited *Nan Karay Phaw* v *Ko Htaw Ah* (1) The issue framed was, "what sum, if any, is due to the plaintiff?" That was the only question to be decided, and the court should not have gone beyond it to find what sum was due to the defendant and to pass a decree for the sum

Dr *Tej Bahadur Sapru* (with him Babu *Durga Charan Banerji*, for the respondent, was not called upon

RICHARDS and TUDBALL, JJ —This appeal arises out of a suit in which the plaintiffs claimed that an account should be taken between them and the defendant as their agent and a decree might be granted for the amount that should be found due on the taking of accounts The defendant never denied his agency He said he was always ready and willing to render an account, and in paragraphs 19 and 20 of the written statement, he alleged that there was money due by the plaintiffs to him which he had demanded The accounts have been taken, and on the taking of accounts the court has found that no money was due to the plaintiffs by the defendant but that there is a sum due by the plaintiffs to the defendant A decree has been given in favour of the defendant for the amount so found due The only point argued in

(1) (1886) I L R. 13 Calc 124

been instituted by the District Magistrate of Fatehpur against the applicant under section 107 of the Code might be transferred to some other district The facts out of which these proceedings arose are immaterial for the purposes of this report, but at the hearing a preliminary objection was taken that the High Court had no power to direct the transfer of proceedings taken under section 107 of the Code of Criminal Procedure to any court outside the district in which, having regard to the provisions of Code, such proceedings might lawfully be instituted

Mr *G W Dillon*, for the applicant

The Government Advocate (Mr. *W Wallach*), for the Crown.

TUDBALL, J —This is an application for transfer of certain proceedings pending in the court of the District Magistrate of Fatehpur against the applicant, under section 107 of the Code of Criminal Procedure to some other competent court outside the Fatehpur district for trial Certain facts have been alleged in the affidavit filed with the application To that affidavit there is a reply by the District Magistrate himself It is quite clear to me after reading this reply that the case is one which for the ends of justice should be transferred to some other court for disposal The District Magistrate's letter shows that he has taken a keen personal interest in the matters which have led up to the present case, and that he has even taken part in the inquiry and has himself on his own information instituted the present proceedings and is more or less convinced of the applicant's guilt. This quite sufficient to arouse in the mind of the applicant a reasonable apprehension that he may not receive that impartial inquiry to which he is under the law entitled. There can be no doubt whatsoever that the District Magistrate is moved by the very best of intentions and desires to maintain the peace of his district and to see that wrongdoers are punished. The case has apparently aroused very great interest and commotion locally, and it is in my opinion expedient that it should be tried in an atmosphere which is free from all those local influences which must exist in Fatehpur itself. It has been urged that the case is one of such a nature that it cannot be transferred to any other court outside the district of Fatehpur. My attention has been called to the ruling *In the matter of the*

# APPELLATE CIVIL.

(*Before Mr. Justice Karamat Husain and Mr. Justice Chamier*)

GIRWARDHARI AND ANOTHER (APPLICANTS) *v* JAI NARAIN AND OTHERS (OPPOSITE PARTIES) *

*Act No III of 1907 (Provincial Insolvency Act), section 15—Insolvency—Grounds for dismissing petition.*

Under the Provincial Insolvency Act, 1907, transfer of property by the debtor with intent to defraud his creditors or reckless contracting of debts or giving unfair preference to any of his creditors or committing any other act of bad faith are grounds for refusing an absolute order of discharge but not grounds for refusing to make an order of adjudication Where, therefore, a petitioner for a declaration of insolvency feigned ignorance about the existence of his account books and prevaricated about other matters, *held* that his petition could not be dismissed on these grounds, the object of the Legislature, by enacting the Insolvency Act, being to make it easier to obtain an order of adjudication. *Ex parte King, Re Davies* (1), *Ex parte Griffin, Re Adams* (2) and *Ex parte Tynte* (3) referred to

THE appellants presented a petition to be declared insolvent under the provisions of the Provincial Insolvency Act, 1907, in the court of the District Judge of Mainpuri. That court dismissed the petition upon the ground that one of the applicants (Girwardhari Lal) had 'feigned ignorance about the existence of his account books and prevaricated on other matters The applicant appealed to the High Court urging that this was not under the Act above referred to an admissible reason for dismissing the petition.

Mr. *M. L. Agarwala* (Babu *Girdhari Lal Agarwala* with him), for the appellants :—

Section 351 *(d)* of the old Code of Civil Procedure, on which the lower court has relied in dismissing the petition, is not applicable, as the Provincial Insolvency Act had already come into force A petition for adjudication of insolvency made by the debtor himself under Act III of 1907 cannot under any circumstances be dismissed, except for the sole reason that the debtor was not entitled under the Act to present it. The court had no jurisdiction to refuse or dismiss such an application after

* First Appeal No 13 of 1909 from an order of L. Marshall, District Judge of Mainpuri, dated the 30th of November, 1908

(1) (1876) L. R., 3 Ch. D., 461 (2) (1879) L. R., 12 Ch. D., 480.
(3) (1880) L. R., 15 Ch. D., 125.

# DISTRICT

# GAZETTEERS,

## UNITED PROVINCES.

---

*The undermentioned Gazetteers of Districts in the United Provinces have recently been published by the Government Press, and are available for sale to the public at the Government Book Depot, Allahabad. The prices quoted include packing and postage charges :—*

| | Rs. | a. | p. |
|---|---|---|---|
| Bulandshahr ... | 3 | 6 | 0 |
| Bahraich ... | 2 | 14 | 0 |
| Sultanpur ... | 2 | 14 | 0 |
| Unao ... | 3 | 6 | 0 |
| Hardoi ... | 3 | 6 | 0 |
| Bara Banki ... | 3 | 6 | 0 |
| Sitapur ... | 2 | 14 | 0 |
| Kheri ... | 2 | 14 | 0 |
| Meerut ... | 3 | 6 | 0 |
| Lucknow ... | 3 | 6 | 0 |
| Ballia ... | 3 | 6 | 0 |
| Muzaffarnagar ... | 3 | 6 | 0 |
| Naini Tal ... | 3 | 6 | 0 |
| Rae Bareli ... | 2 | 14 | 0 |
| Partabgarh ... | 2 | 14 | 0 |
| Fyzabad ... | 3 | 6 | 0 |

| | Rs. | a. | p. |
|---|---|---|---|
| Gonda ... | 3 | 6 | 0 |
| Agra ... | 3 | 6 | 0 |
| Fatehpur ... | 3 | 6 | 0 |
| Basti ... | 3 | 6 | 0 |
| Budaun ... | 3 | 6 | 0 |
| Bijnor ... | 3 | 6 | 0 |
| Jaunpur ... | 4 | 6 | 0 |
| Benares ... | 4 | 6 | 0 |
| Ghazipur ... | 3 | 6 | 0 |
| Pilibhit ... | 2 | 14 | 0 |
| Banda ... | 3 | 6 | 0 |
| Saharanpur ... | 3 | 6 | 0 |
| Cawnpore ... | 4 | 6 | 0 |
| Hamirpur ... | 2 | 14 | 0 |
| Jalaun ... | 2 | 14 | 0 |

*Apply to the SUPERINTENDENT,*
*Government Press, Allahabad.*

be annulled could also be taken into consideration before making the order and be properly made the ground for refusing to make the order, *Nathu Mal* v. *The District Judge of Benares* (1).

Further, such conduct of the debtor as was complained of in the present case would amount to an abuse of the process of the Insolvency Court, and the petition could for that reason be thrown out in the exercise of the inherent power of the court to prevent abuse of its process He referred to Wace *The Law and Practice of Bankruptcy*, p 62

Mr *M L Agarwala* replied

CHAMIER, J —This is an appeal against an order of the District Judge of Mainpuri dismissing an insolvency petition presented by the appellants under the Provincial Insolvency Act (III of 1907)

The learned Judge appears to have been under the impression that the proceedings were governed by the Code of Civil Procedure, 1882, for in dismissing the petition he refers to section 351 of that Code We must, however, consider whether the dismissal of the petition can be supported under the Provincial Insolvency Act The grounds stated for dismissing the petition are that the appellant Girwardhari Lal feigned ignorance about the existence of his account books and prevaricated on other matters.

Section 12 of the Provincial Insolvency Act provides that when an insolvency petition is admitted, the court shall make an order fixing a date for hearing the petition and notice of the order shall be given to the creditors by publication in the Local Official Gazette and in such other manner as may be prescribed The learned District Judge fixed a date for the hearing of the petition, but failed to give notice in the manner directed by that section No objection having been made on this account, we may disregard this irregularity.

Section 14 provides that on the day fixed for the hearing of the petition the Court shall require proof that the creditor or the debtor, as the case may be, is entitled to present the petition;

(1) (1910) I. L. R., 32 All., 51

# THE INDIAN LAW REPORTS.

*Published in FOUR SERIES, viz.*—

## CALCUTTA, MADRAS, BOMBAY AND ALLAHABAD.

The Indian Law Reports, published under the authority of the Governor General in Council, are printed in monthly parts, which are issued, as soon as possible after the first of each month, at Calcutta, Madras, Bombay and Allahabad, respectively.

The reports comprise four series—one for the Calcutta High Court, a second for the Madras High Court, a third for the Bombay High Court and a fourth for the Allahabad High Court.

The cases heard by the Privy Council on appeal from each High Court are reported in the for that High Court. Cases heard by the Privy Council on appeal from Provinces in India not s to any High Court are reported in the Calcutta Series.

The Calcutta Series is distributed by the Bengal Secretariat Book Dépôt, and the Madras, Bo and Allahabad Series are distributed direct from Madras, Bombay and Allahabad, respectively.

Persons desiring to subscribe for or purchase the reports should apply to—
the Officer in charge, Bengal Secretariat Book Dépôt, Calcutta, or
the Superintendent, Government Press, Madras, or
the Superintendent, Government Central Press, Bombay, or
THE CURATOR OF GOVERNMENT BOOKS, United Provinces, Allahabad.

## PRICES.

The terms of subscription, and the terms on which current issues and back numbers are sold, a as follows:—

| | Without postage | With Indian postage | With Foreign postage |
|---|---|---|---|
| | Rs. a. p. | Rs. a. p. | Rs. a. p. |
| COMPLETE SERIES— | | | |
| Current issues, per annum | ... | 22 8 0 | 23 0 0 |
| Back numbers, per annum | 20 0 0 | 22 8 0 | 23 0 0 |
| CALCUTTA SERIES— | | | |
| Current issues, or back numbers, per annum | 10 0 0 | 13 8 0 | 14 0 0 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | | |
| Current issues or back numbers, per annum | 6 0 0 | 7 0 0 | 8 0 0 |
| ANY MONTHLY PART— | | | |
| Calcutta Series | 2 0 0 | 2 0 0 | 2 0 0 |
| Madras Bombay or Allahabad Series | 1 0 0 | 1 0 0 | 1 0 0 |

*All payments must be made in advance.* Remittances to Calcutta should be addressed to the TREASURER, BENGAL SECRETARIAT, *Writers' Buildings, Calcutta.*

## PARTS OUT OF STOCK AND DUPLICATE COPIES.

When a requisition is received for any set of the reports, and any Parts are out of stock the following deduction from the foregoing rates is made for such Parts:—

| | Without postage | With Indian postage |
|---|---|---|
| | Rs. a. p. | Rs. a. p. |
| CALCUTTA SERIES— | | |
| All Parts for one year | 7 2 6 | 8 6 3 |
| Any one Part | 0 8 9 | 0 10 3 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | |
| All Parts for one year | 4 4 6 | 4 11 3 |
| Any one Part | 0 5 3 | 0 5 9 |

If any Part is lost in transit to a subscriber, and the fact is reported to the office of distribution within three months from the date of publication, a duplicate will be supplied at the following rate:—

| | Without postage | With Indian postage |
|---|---|---|
| | Rs. a. p. | Rs. a. p. |
| CALCUTTA SERIES | 0 8 9 | 0 10 3 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES | 0 5 3 | 0 5 9 |

## REPRINTS.

The Complete Series for the years 1878, 1879 1880 1883, 1884, 1885 1886 1889, 1893 1890 1891 1894 1895 1896, 1897 1898, 1899 1901 1903, and 1905 to 1909 has been reprinted and may be purchased at the Bengal Secretariat Book Dépôt, Calcutta, either wholly or in part. All parts required to complete the stock of the Reports for other years are now being reprinted. Complete Reports from the beginning to date will therefore shortly be available at the Bengal Secretariat Book Dépôt.

## ADVERTISEMENT FOR THE CALCUTTA SERIES.

ADVERTISEMENTS of law publications only are received. Rates can be ascertained on application to the Bengal Secretariat Book Dépôt.

SEVERAL volumes of the Full Bench Rulings Parts I and II, are available at the Bengal Secretariat Book Dépôt, Calcutta, at the following rates:—

| | Without postage | With Indian postage |
|---|---|---|
| | Rs. a. p. | Rs. a. p. |
| FULL BENCH RULINGS, Parts I and II | 20 0 0 | 22 8 0 |

observed as follows —"We wish to clearly express our opinion that the learned Judge was clearly wrong in granting the petition of Nathu Mal and declaring him an insolvent Section 15 of Act III of 1907 provides amongst other things that if the Court is of opinion for any sufficient reason that an order of adjudication should not be made, the Court shall dismiss the petition" As they were dealing with an appeal against a conviction under section 43 of the Act the remarks which I have quoted were not necessary for the disposal of the appeal In these circumstances I under stand that we are not bound to adopt the view expressed by them After careful consideration, I find myself unable to accept the construction which they put upon the Act It appears to me that the last 33 words of sub section (1) of section 15 refer only to the case of an insolvency petition presented by a creditor The words "that for any sufficient cause" appear to me to be governed by the words 'satisfied by the debtor"—that is to say, the cause referred to is a cause to be shown by the debtor In my opinion the words 'satisfied by the debtor" govern the whole of the remainder of the sub section

The scheme of the Act differs entirely from the scheme of the sections of the Code of Civil Procedure, 1882, which relate to insolvency matters Under section 351 of that Code the Court could grant an insolvency application only on being satisfied that the debtor had not transferred any part of his property with intent to defraud his creditors and had not recklessly contracted debts or given an unfair preference to any of his creditors and had not committed any other act of bad faith regarding the matter of the application Under the Insolvency Act, 1907, these appear to be grounds for refusing an absolute order of discharge (see section 44) but not grounds for refusing to make an order of adjudication The latter part of sub-section (1) of section 15 of the Act of 1907 reproduces almost word for word section 7, sub-section (3) of the English Bankruptcy Act of 1883, which plainly refers to an insolvency petition presented by a creditor In my opinion the latter part of sub-section (1) of section 15 of the Indian Act has no reference to an insolvency petition presented by a debtor Authority for dismissing a

# THE INDIAN LAW REPORTS.

*Published in FOUR SERIES, viz.—*

CALCUTTA, MADRAS, BOMBAY AND ALLAHABAD.

THE Indian Law Reports, published under the authority of the Governor General in Council, are printed in monthly parts, which are issued, as soon as possible after the first of each month, at Calcutta, Madras, Bombay and Allahabad, respectively

The reports comprise four series—one for the Calcutta High Court, a second for the Madras High Court, a third for the Bombay High Court and a fourth for the Allahabad High Court.

The cases heard by the Privy Council on appeal from each High Court are reported in the Series for that High Court. Cases heard by the Privy Council on appeal from Provinces in India not subject to any High Court are reported in the Calcutta Series

The Calcutta Series is distributed by the Bengal Secretariat Book Dépôt; and the Madras, Bombay and Allahabad Series are distributed direct from Madras, Bombay and Allahabad, respectively

[illegible] to—

[illegible]

THE CURATOR OF GOVERNMENT BOOKS, United Provinces, Allahabad.

## PRICES.

The terms of subscription, and the terms on which current issues and back numbers are sol[d] as follows —

| | Without postage | With Indian postage | With Forei[gn] postage |
|---|---|---|---|
| | Rs. a. p. | Rs. a. p. | Rs. a. p. |
| COMPLETE SERIES— | | | |
| Current issues, per annum ... ... | ... | 22 8 0 | 23 0 0 |
| Back numbers, per annum ... ... | 20 0 0 | 22 8 0 | 23 0 0 |
| CALCUTTA SERIES— | | | |
| [illegible] | 10 0 0 | 12 8 0 | 14 0 0 |
| [illegible] | 6 0 0 | 7 0 0 | 8 0 0 |
| ANY MONTHLY PART— | | | |
| Calcutta Series ... | 2 0 0 | 2 0 0 | 2 0 0 |
| Madras Bombay or Allahabad Series | 1 0 0 | 1 0 0 | 1 0 0 |

*All payments must be made in advance* Remittances to Calcutta should be addressed to THEASURER, BENGAL SECRETARIAT, *Writers' Buildings, Calcutta*

## PARTS OUT OF STOCK AND DUPLICATE COPIES

WHEN a requisition is received for any set of the reports, and any Parts are out of stock following deduction from the foregoing rates is made for such Parts —

| | Without postage | With Indian post[age] |
|---|---|---|
| | Rs. a. p. | Rs. a. p. |
| CALCUTTA SERIES | | |
| All Parts for one year ... | 7 2 6 | 8 6 3 |
| Any one Part ... | 0 8 3 | 0 10 3 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES— | | |
| All Parts for one year .. .. ... | 4 4 6 | 4 11 3 |
| Any one Part .. .. ... | 0 5 3 | 0 5 9 |

If any Part is lost in transit to a subscriber, and the fact is reported to the office of distribut[ion] within three months from the date of publication, a duplicate will be supplied at the following rat[es]

| | Without postage | With Indian pos[tage] |
|---|---|---|
| | Rs. a. p. | Rs. a. p. |
| CALCUTTA SERIES ... | 0 8 9 | 0 10 3 |
| MADRAS, BOMBAY OR ALLAHABAD SERIES ... | 0 5 3 | 0 5 9 |

## REPRINTS.

THE Complete Series for the years 1878 1879, 1880, 1883, 1884, 1885 1886 1889, 1887 1893 1[illegible] 1894 1895 1896 1897 1898 1899 1901 1903, and 1905 to 1909 has been reprinted and ma[y be] purchased at the Bengal Secretariat Book Depôt, Calcutta, either wholly or in part. All [illegible] required to complete the stock of the Reports for other years are now being reprinted. C[illegible] Reports from the beginning to date will therefore shortly be available at the Bengal S[ecretariat] Book Dépôt.

## ADVERTISEMENT FOR THE CALCUTTA SERIES

ADVERTISEMENTS of law publications only are received. Rates can be ascertained on applic[ation] to the Bengal Secretariat Book Dépôt.

SEVERAL volumes of the Full Bench Rulings, Parts I and II, are available at the Beng[al] Secretariat Book Dépôt, Calcutta, at the following rates:—

| | Without postage | With Indian post[age] |
|---|---|---|
| | Rs. a. p. | Rs. a. p. |
| FULL BENCH RULINGS, Parts I and II ... ... | 20 0 0 | 22 8 0 |

In short, no pains are spared to make the publication useful in the superlative degree

V.—The object of the publication is to unify the system of law reporting in India. The rulings of the Privy Council, High Courts, Chief Courts and Judicial Commissioners' Courts in India are collected in one place, that is, the case law of all the Superior Courts, which is scattered over a score of volumes published yearly in the various provinces, is compressed in four bulky volumes of a running series.

VI.—To meet the convenience of junior practitioners the **Back Volumes** of Indian Cases are sold on the **Instalment system.** On receipt of Rs. 10-8—the price of one **Bound Volume**—in advance, all the up to date Volumes will be supplied by V. P. P. for the cost of carriage and the **balance** shall be payable by monthly instalments of Rs. 10-8 each.

S. D. CHAUDHRI,
PLEADER, CHIEF COURT, PUNJAB,
Lahore.

---

*Dated , 191 .*

*To*

THE MANAGER,
Indian Cases,
LAHORE.

*Please place my name on the List of Subscribers to* **Indian Cases** *and send the* **Future Fortnightly** *Parts* [illegible]

*I also require all* **back Volumes** ______. *Rs. 10-8 the price of one* **bound** *Volume, is remitted in advance. Send the above Volumes and recover the cost of carriage by V. P. P. The* **balance** ______ *I shall remit by monthly instalments of Rs. 10-8 each.*

**Name** ______________

**Address** ______

| | |
|---|---|
| Sole Foreign Agents<br>Messrs. SWEET & MAXWELL, Ltd.<br>3, Chancery Lane, LONDON,<br>To whom all Foreign Subscriptions should be sent. | Agents for Bengal<br>MANINDRA NATH MITRA & BROS.,<br>Law Book-Sellers, Publishers and Book-Binders<br>90, Harrison Road, CALCUTTA. |

The Bombay Code, Vol I Third Edition 1907 ... Rs 4 (8 a)
Ditto Vol II, Third Edition 1907 ... Rs 6 (8 a)
Ditto Vol III, Third Edition, 1908 ... Rs 5 (8 a)
Ditto Vol IV, Third Edition, 1909 ... Rs 4 (8 a)
Volumes I to IV Reduced to Rs 11 per set.
The Coorg Code Third Edition 1908 ... Rs 2 (4 a)
E B & Assam Code Vol I, Edition, 1907 ... Rs 6 (10 a)
Ditto Vol II, Edition 1907 ... Rs 8 (9 a)
Ditto Vol III Edition 1907 ... Rs 6 (9 a)
Volumes I to III reduced to Rs 16 per set
The United Provinces Code Vol I, Fourth Edition 1906 consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table ... Rs 5 (8 a)
The United Provinces Code, Vol II, Fourth Edition 1906, consisting of the Acts of the Lieutenant Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in or extended to the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874 with an Index Rs 10 (Re 1) for both Vols or Rs 6 (8 a) for each Volume
The United Provinces Code, Vols I and II reduced to Rs 7 per set

*In the Press*

A new edition of the Burma Code

## II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS MODIFIED BY SUBSEQUENT LEGISLATION

Act I of 1846 (Legal Practitioners), as modified up to 1st October, 1907 ... 2 a (1 a)
Act XXI of 1850 (Removal of Caste Disabilities) with foot notes ... 1 a 6 p (1 a)
Act XXXVII of 1850 (Public Servants Inquiries) as modified up to 1st August 1908 ... 11 a (1 a)
Act XXX of 1852 (Naturalization of Aliens), as modified up to 30th April 1908 ... 2 a (1 a)
Act XX of 1853 (Legal Practitioners), as modified up to 1st September 1907 ... 1 a 9 p (1 a)
Act XXIV of 1854 (Malabar War-Knives) with foot notes ... 1 a 3 p (1 a)
Act XXIII of 1855 (Administration of mortgaged Estates), as modified up to 1st October, 1908 ... 1 a 3 p (1 a)
Act XXIV of 1855 (Penal Servitude) as modified up to 1st January, 1909 ... 2 a (1 a)
Act XIII of 1857 (Opium), as modified up to 1st August 1908 ... 4 a 3 p (1 a)
Act XXVII of 1857 (Madras University), with foot notes ... 2 a 9 p (1 a)
Act IX of 1859 (Forfeiture) as modified up to 1st October 1908 ... 1 a 9 p (1 a)
Act XXIV of 1859 (Madras District Police) as modified up to 1st November, 1907 ... 3 a 6 p (2 a)
Act XVI of 1863 (Excise Duty on Spirits) as modified up to 1st October 1908 ... 2 a (1 a)
Act XXXI of 1863 (Gazette of India) with footnotes ... 1 a 3 p (1 a)
Act XV of 1864 (Indian Tolls) as modified up to 30th June 1909 ... 1 a 9 p (1 a)
Act X of 1865 (Succession) as modified up to 1st April 1909 ... Rs 1-8 (2 a)
Act XXII of 1867 (Sarais and Paraos) as modified up to 1st August, 1908 ... 2 a (1 a)
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907 ... 5 a (1 a)

| | |
|---|---|
| Act XVI of 1909 (Northern India Canal and Drainage) with foot notes, | 1 a (1 a) |
| Act X of 1904 (Co operative Credit Societies) with reference to rules under the Act .. | 5 a 6 p (1 a) |
| Regulation III of 1818 (Bengal State Prisoners Regulation) as modified up to 1st August, 1909 ... . | 2 a 9 p (1 a) |
| Regulation I of 1890 (British Baluchistan Laws Regulation), as modified up to 1st June, 1909 .. | 3 p (1 a) |

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED

Acts (Unrepealed) of the Governor General of India in Council from 1907 up to date

Regulations made under the Statute 33 Vict, Cap 3 from 1907 up to date

(The above may be obtained separately The price is noted on each )

## IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL

| | | |
|---|---|---|
| Act XXI of 1850 (Caste Disabilities) with foot notes | In Urdu | 3 p (1 a) |
| Ditto ditto | In Hindi | 3 p (1 a) |
| Act XXXVII of 1850 (Public Servants Inquiries), as modified up to 1st August, 1908 | In Urdu | 9 p (1 a) |
| Ditto ditto | In Nagri | 9 p (1 a) |
| Act XIII of 1857 (Opium), as modified up to 1st August, 1908 | In Urdu | 9 p (1 a) |
| Ditto ditto | In Nagri | 9 p (1 a) |
| Act IX of 1859 (Forfeiture), as modified up to 1st October, 1908 | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p. (1 a.) |
| Act XVI of 1863 (Excise), as modified up to 1st October, 1908 | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri. | 3 p (1 a) |
| Act XXXI of 1863 (Official Gazette) with footnotes | In Urdu. | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act XV of 1864 (Indian Tolls), as modified up to 30th June, 1909 | In Urdu | 3 p (1 a.) |
| Ditto ditto | In Nagri | 3 p (1 a.) |
| Act X of 1865 (Succession) as modified up to 1st April, 1909 | In Urdu. | 11 a 3 p (2 a.) |
| Ditto ditto | In Nagri | 11 a 3 p (2 a) |
| Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August, 1908 | In Urdu | 6 p (1 a) |
| Ditto ditto | In Nagri | 6 p (1 a) |
| Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1907 | In Urdu | 1 a 3 p (1 a) |
| Ditto ditto | In Nagri | 1 a. 3 p (1 a.) |
| Act V of 1870 (Unclaimed Deposits), as modified up to 1st October, 1908 | In Nagri | 3 p (1 a) |
| Act VII of 1870 (Court fees), as modified up to 1st February, 1909 | In Urdu | 6 a 9 p (1 a) |
| Ditto ditto | In Nagri | 6 a 6 p (1 a.) |
| Act XXVII of 1871 (Criminal Tribes) as modified up to 1st September, 1908 | In Urdu | 1 a 3 p (1 a) |
| Ditto ditto | In Nagri. | 1 a 3 p (1 a) |
| Act I of 1872 (Evidence), as modified up to 1st May, 1908 | In Urdu. | 8 a (2 a) |
| Ditto ditto | In Nagri | 8 a. (2 a) |
| Act I of 1878 (Opium), as modified up to 1st October, 1907 | In Urdu | 1 a 6 p. (1 a) |
| Ditto ditto | In Nagri | 1 a 6 p (1 a.) |
| Act XII of 1880 (Kazis) with footnotes | In Urdu. | 3 p. (1 a) |
| Act II of 1882 (Trusts) as modified up to 1st June, 1909 | In Nagri | 3 a 6 p (1 a) |
| Act XIII of 1889 (Cantonments), as modified up to 1st October, 1907 | In Urdu. | 3 a (1 a. 6 p) |

## V.—MISCELLANEOUS PUBLICATIONS

Table showing Effect of Legislation in the Governor General's Council during 1906 ... ... .. . .. 3a 6p (1a.)

Ditto ditto during 1907 2a 6p (1a.)

Ditto ditto during 1908 ... 4a (1a)

Ditto ditto during 1909 .. 3a 3p (1a.)

Annual Indexes to the Acts of the Governor General of India in Council for 1906, 1907, 1908 and 1909. The price is noted on them

Proceedings of the Council of the Governor General of India for making Laws and Regulations from 1906 to date Super-royal 4to Annual subscription Rs. 5 (Re. 1); single issue 4a, including postage

List of General Rules and Orders under Statutes and General Acts in force in British India Corrected up to 31st December, 1908 ... Rs. 1 4 0 (3a)

Addenda and Corrigenda List No 1 of 1909 to the List of General Rules and Orders . .. ... 3p (1a.)

Ditto ditto No II of 1909 . 7a 6p (1a)

Chronological Tables of the Indian Statutes compiled under the orders of the Government of India by F G Wigley, of the Inner Temple, Barrister-at-Law, Edition 1909 . . .. Rs 4 (5a.)

A Digest of Indian Law Cases, containing the High Court Reports and Privy Council Reports of Appeals from India, 1901-03, with an Index of cases, compiled under the orders of the Government of India, by F G Wigley, of the Inner Temple, Bar-at-Law. Edition 1906 Rs 10 Reduced to Rs 3 per copy ... ... (10a)

A Digest of Indian Law Cases containing the High Court Reports and Privy Council Reports of Appeals from India, 1904, with an Index of cases, compiled under the orders of the Government of India, by C E Grey Bar-at-Law, Edition 1907 Re 1 4a Reduced to Re 1 per copy (6a)

Ditto ditto 1905, by C E Grey, Bar-at Law Edition 1908 Re 1 4 Reduced to Re 1 per copy .. (6a)

Ditto ditto 1906 by C E Grey, Bar-at Law, Edition 1908 Re 1 4 Reduced to Re 1 per copy (6a)

Ditto ditto 1907 by B D Bose, Bar-at Law, Edition 1908 Re 1-4 Reduced to Re 1 per copy ... (6a)

Ditto ditto 1908, by C L Grey, Bar-at Law Edition 1910 . .. , Rs 2 (6a)

Set of Digests from 1901—1907 Reduced to Rs 7 per set of 6 volumes) . .. .. ... (Rs 2)

General Rules and Orders made under enactments in force in British India consisting of General Rules, Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor General in Council with an Index In three Volumes Rs 15 Reduced to Rs 10 per set (Rs 2) or Rs 5 per Volume ... .. . (12a)

Volume IV in the Press

Title page and Contents of the Acts passed by the Governor General of India in Council in the year 1907 ... . .. 1a 6p (1a)

Ditto ditto 1908 ... ... 5a 9p (1a)

Ditto ditto 1909 ... .. 3a 3p (1a)

| | |
|---|---|
| Act XII of 1855 (Legal Representatives' Suits) as modified up to 1st November 1904 ... | 1a (1a) |
| Act XIII of 1855 (Fatal Accidents) as modified up to 1st December, 1903 ... ... ... | 2a (1a) |
| Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December 1903 | 1a 6p (1a) |
| Act XX of 1856 (Bengal Chaukidars) as modified up to 1st November, 1903 | 7a (1a) |
| Act IV of 1857 [Tobacco (Bombay Town)] as modified up to 1st December 1906 ... | 3a 9p (1a) |
| Act XXIX of 1857 (Land Customs Bombay), as modified up to 1st December 18 5 ... | 4a (1a) |
| Act III of 1858 (State Prisoners) as modified up to 1st August, 1897 | 2a (1a) |
| Act XXXIV of 1858 [Lunacy (Supreme Courts)] as modified up to 30th April 1903 ... ... | 4a 3p (1a) |
| Act XXXV of 1858 [Lunacy (District Courts)] as modified up to 30th April 1903 ... | 2a 3p (1a) |
| Act XXXVI of 1858 (Lunatic Asylums) as modified up to 31st May, 1902 | 5a (1a) |
| Act I of 1859 (Merchant Shipping) as modified up to 30th June 1905 | 13a (2a) |
| Act XI of 1859 (Bengal Land Revenue Sales) as modified up to 1st August 1903 ... ... | 4a (1a) |
| Act XIII of 1859 (Workman's Breach of Contract) as affected by Act XVI of 1874 ... ... | 1a 6p (1a) |
| Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December 1904 | a 6p (1a) |
| Act XX of 1860 (Societies Registration) as modified up to 1st December 1904 | 2a 9p (1a) |
| Act XLV of 1860 (Indian Penal Code) as modified up to 1st April 1903 with an Index | Rs 2 8 (5a) |
| Act V of 1861 (Police) as modified up to 7th March 1903 | 7a 6p (1a 6p |
| Act XVI of 1861 (Stage carriages) as modified up to 1st February, 1898 ... | 3a 6p (1a) |
| Act XXIII of 1863 (Claims to Waste lands) as modified up to 1st December 1896 | 4a 9p (1a) |
| Act III of 1864 (Foreigners) as modified up to 1st September 1906 ... | 3a 6p (1a) |
| Act XVII of 1864 (Official Trustees) as modified up to 1st July 1890 | 5a 6p (1a) |
| Act III of 1865 (Carriers) as modified up to 31st May 1903 ... | 3a (1a) |
| Act III of 1867 (Gambling) as modified up to 1st January 1905 | 4a (1a) |
| Act XX of 1869 (Volunteers) as modified up to 1st May 1896 | 4a 9p (1a) |
| Act I of 1871 (Cattle Trespass) as modified up to 1st May 1906 | 6a (1a) |
| Act III of 1872 (Special Marriages) as modified up to 1st November 1906 | 4a 6p (1a) |
| Act IV of 1872 (Punjab Laws) as modified up to 1st November 1904 | 7a (1a) |
| Act XV of 1872 (Christian Marriage) as modified up to 1st December 1904 | 10a (2a) |
| Act V of 1873 (Government Savings Bank) as modified up to 1st April 1903 ... | 3a 6p (1a) |
| Act X of 1873 (Oaths) as modified up to 1st February 1903 | 3a 9p (1a) |
| Act II of 1874 (Administrator General) as modified up to 1st July 1890; with a list of Native States included within the Presidencies of Bengal Madras and Bombay respectively for the purposes of the Act | 11a (2a) |
| Act XIV of 1874 (Scheduled Districts) as modified up to 1st October 1895 | 6a (1a) |

| | |
|---|---|
| Act XII of 1891 (Repealing and Amending Act, showing the Schedules as modified up to 31st May, 1902) ... ... ... | 12 a. (1 a. 6 p) |
| Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897 . .. .. ... | 1 a. 3 p (1 a) |
| Act I of 1894 (Land Acquisition), with footnotes ... | 7 a (1 a.) |
| Act VIII of 1894 (Tariff), as modified up to 1st February, 1906 .. | 9 a (2 a) |
| Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898 ... | 7 a 6 p (1 a. 6 p) |
| Act XII of 1896 (Excise), as modified up to 1st March, 1907 ... | 8 a (2 a.) |
| Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903 ... | 1 a 6 p (1 a) |
| Act II of 1899 (Stamps), as modified up to 1st March, 1907. . ... | Re 1. (2 a) |
| Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900 ... ... ... ... ... | 1 a. (1 a) |
| Act III of 1900 (Prisoners), as modified up to 1st March, 1905 .. | 6 a 6 p. (1 a.) |
| Act XV of 1903 (Extradition), as modified up to 1st December, 1904 ... | 5 a. 6 p. (1 a) |
| Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st October, 1899 . . ... .. ... ... | 6 a. 6 p. (1 a.) |
| Regulations V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July, 1903 ... ... ... ... ... | 1 a. 9 p. (1 a) |
| Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February, 1897 .. ... ... | 5 a 6 p. (1 a) |
| Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June, 1894 . ... ... ... ... | 13 a (2 a) |
| Regulation VI of 1886 (Ajmere Rural Boards), as modified up to 1st February, 1897 . ... ... ... | 5 a. 6 p. (1 a) |
| Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899 ... ... ... ... | 4 a. 9 p. (1 a) |
| Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902 ... ... ... ... ... | 6 a. (1 a) |

## III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1906.
Regulations made under the Statute 33 Vict Cap 3 from No II of 1875 to 1906. 8 vo. Stitched

[The above may be obtained separately The price is noted on each.]

## IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

| | |
|---|---|
| Act X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893, with footnotes brought down to 1st December 1901 .. .. ... ... | In Urdu 2 a 6 p (1 a) |
| Act XX of 1847 (Copyright), as modified up to 1st May, 1896 ... | In Urdu 1 a 3 p (1 a.) |
| Ditto ditto ... | In Nagri 1 a 3 p (1 a) |
| Act XVIII of 1850 (Judicial Officers' Protection), with footnotes ... | In Urdu. 6 p (1 a) |
| Ditto ditto ... | In Nagri. 6 p. (1 a) |
| Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903 | In Urdu. 6 p (1 a) |
| Ditto ditto | In Nagri 6 p. (1 a) |
| Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902 .. . . .. ... | In Urdu. 6 p. (1 a) |
| Ditto ditto ... | In Nagri 6 p (1 a.) |
| Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904 .. . ... | In Urdu 3 p (1 a) |
| Ditto ditto ... | In Nagri. 3 p (1 a) |
| Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903 .. ... ... ... ... | In Urdu 6 p (1 a) |
| Ditto ditto ... | In Nagri 6 p (1 a) |

| | |
|---|---|
| Act II of 1892 (Christian Marriage Validation) | In Urdu 3p (1a) |
| Act IV of 1892 (Bengal Court of Wards Amendment) | In Urdu 6p (1a) |
| Act VI of 1892 (Limitation Act and Civil Procedure Code Amendment) | In Urdu 3p (1a) |
| Act IV of 1893 (Partition) | In Urdu 3p (1a) |
| Act I of 1894 (Land Acquisition) | In Urdu 3a 3p (1a 6p) |
| Ditto | In Nagri 1a 6p (1a) |
| Act III of 1894 (Criminal Procedure and Penal Codes Amendment) | In Urdu 3p (1a) |
| Act V of 1894 (Civil Procedure Code Amendment) | In Urdu 3p (1a) |
| Ditto ditto | In Nagri 3p (1a) |
| Act VIII of 1894 (Tariff) as modified up to 1st October 1903 | In Urdu 4a (1a) |
| Ditto ditto | In Nagri 3a 9p (1a) |
| Act IX of 1894 (Prisons) | In Urdu 2a 3p (1a) |
| Ditto | In Nagri 2a 3p (1a) |
| Act VII of 1895 (Civil Procedure Code and Punjab Law Act Amendment) | In Urdu 3p (1a) |
| Ditto ditto | In Nagri 3p (1a) |
| Act XII of 1895 (Companies—Memorandum of Association) | In Urdu 3a (1a) |
| Act XIV of 1895 (Pilgrim Ships) | In Urdu 1a 3p (1a) |
| Act II of 1896 (Cotton-duties) | In Urdu 1a 3p (1a) |
| Ditto | In Nagri 1a (1a) |
| Act VI of 1896 (Indian Penal Code Amendment) | In Urdu 3p (1a) |
| Act VIII of 1896 (Inland Bonded Warehouses) | In Urdu 3p (1a) |
| Ditto ditto | In Nagri 3p (1a) |
| Act XII of 1896 (Excise) as modified up to 1st August 1905 | In Nagri 3a 3p (1a) |
| Act I of 1897 [Public (Servants Inquiries) Amendment] | In Urdu 3p (1a) |
| Ditto ditto | In Nagri 3p (1a) |
| Act II of 1897 (Criminal Tribes Amendment) | In Urdu 3p (1a) |
| Act III of 1897 (Epidemic Diseases) | In Urdu 3p (1a) |
| Ditto | In Nagri 3p (1a) |
| Act IV of 1897 (Fisheries) | In Urdu 3p (1a) |
| Ditto | In Nagri 3p (1a) |
| Act VI of 1897 (Negotiable Instruments Act Amendment) | In Urdu 3p (1a) |
| Ditto ditto | In Nagri 3p (1a) |
| Act VIII of 1897 (Reformatory Schools) | In Urdu 1a 3p (1a) |
| Ditto | In Nagri 6p (1a) |
| Act IX of 1897 (Provident Funds) as modified up to 1st April 1903 | In Urdu 9p (1a) |
| Ditto ditto | In Nagri 9p (1a) |
| Act X of 1897 (General Clauses) | In Urdu 1a (1a) |
| Ditto | In Nagri 1a (1a) |
| Act XII of 1897 (Local Authorities Emergency Loans) | In Urdu 3p (1a) |
| Ditto ditto | In Nagri 3p (1a) |
| Act XV of 1897 (Cantonments) | In Urdu 3p (1a) |
| Act I of 1898 [Stage-carriages Act (1861) Amendment] | In Urdu 3p (1a) |
| Ditto ditto | In Nagri 3p (1a) |
| Act III of 1898 (Lepers) | In Urdu 6p (1a) |
| Ditto | In Nagri 6p (1a) |
| Act IV of 1898 (Indian Penal Code Amendment) | In Urdu 3p (1a) |
| Act V of 1898 (Code of Criminal Procedure) as modified up to 1st April 1900 | In Urdu 1 14 (8a) |
| Ditto ditto | In Nagri 1 10 (8a) |
| Act VI of 1898 (Post Office) | In Urdu 3a 3p (1a) |
| Ditto | In Nagri 3a 3p (1a) |
| Act IX of 1898 (Live-stock Importation) | In Urdu 3p (1a) |
| Ditto | In Nagri 3p (1a) |
| Act X of 1898 (Indian Insolvency Rules) | In Urdu 3p (1a) |

| | | |
|---|---|---|
| Act V of 1902 (Administrators General and Official Trustees) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VII of 1902 [United Provinces (Designation)] | In Urdu | 3 p (1 a) |
| Act VIII of 1902 (Indian Tariff) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act II of 1903 [Indian Post Office (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act III of 1903 (Electricity) | In Urdu | 2 a 6 p (1 a 6 p) |
| Ditto | In Nagri | 2 a (1 a 6 p) |
| Act VII of 1903 (Works of Defence) | In Urdu | 1 a 3 p (1 a) |
| Ditto | In Nagri | 1 a 3 p (1 a) |
| Act VIII of 1903 (Probate and Administration) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act IX of 1903 (Tea Cess) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act X of 1903 (Victoria Memorial) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act XIII of 1903 (Lepers) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act XIV of 1903 (Indian Foreign Marriages) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act XV of 1903 (Extradition), as modified up to 1st December, 1904 | In Urdu | 1 a 9 p (1 a) |
| Ditto ditto | In Nagri | 1 a 9 p (1 a) |
| Act I of 1904 (Poisons) | In Urdu | 6 p (1 a) |
| Ditto | In Nagri | 6 p (1 a) |
| Act III of 1904 (Local Authorities Loan) | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act IV of 1904 (North West Border Military Police) | In Urdu | 9 p (1 a) |
| Act VI of 1904 [Transfer of Property (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VII of 1904 (Ancient Monuments Preservation) | In Urdu | 9 p (1 a) |
| Ditto ditto | In Nagri | [illegible] p (1 a) |
| Act VIII of 1904 (Indian Universities) | In Urdu | 3 p 1 a 3 p (1 a) |
| Ditto | In Nagri | 3 p 1 a 3 p (1 a) |
| Act X of 1904 (Co operative Credit Societies) | In Urdu | [illegible] (1 a) |
| Ditto | In Nagri | 1 a (1 a) |
| Act XI of 1904 (to revive and continue section 8 B of the Indian Tariff Act, 1894) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act XIII of 1904 (Indian Articles of War Amendment) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act XV of 1904 [Indian Stamp (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto | In Nagri | 3 p (1 a) |
| Act I of 1905 [Local Authorities Loan (Amendment)] | In Urdu | 3 p (1 a) |
| Ditto Ditto | In Nagri | 3 p (1 a) |
| Act II of 1905 [Indian Universities (Validation)] | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p 1 a) |
| Act III of 1905 (Indian Paper Currency) | In Urdu | 9 p (1 a) |
| Ditto | In Nagri | 9 p (1 a) |
| Act IV of 1905 (Indian Railway Board) | In Urdu | 3 p (1 a) |
| Act VI of 1905 (Court fees Amendment) | In Urdu | 3 p (1 a) |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Act VII of 1905 (Bengal and Assam Laws) | In Urdu | 3 p 1 a |
| Ditto ditto | In Nagri | 3 p (1 a) |
| Regulation I of 1890 (British Baluchistan Laws) | In Urdu | 2 a (1 a 3 p) |

was in fact wholly voluntary. *Held* that the plaintiff's suit would not lie. *Tholappala Charlu* v. *Venkata Charlu* (1), *Srinivasa* v. *Tirurengada* (2), and *Hur Lall* v. *Jeorakhan Lall* (3), referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgement of Sir George Knox, acting Chief Justice.

The facts of the case are fully stated in the judgement under appeal, which was as follows:—

"This second appeal arises out of a suit instituted by one Mahant Babu Nandan Misr under the guardianship of Jamna Prasad. The defendant to the suit is one Chunnu Datt Tewari described as a priest, resident of Benares. The relief asked for in the plaint is that:—

(1) It may be declared that the plaintiff has a right to perform the Chittrakoot Ram Lila, Narsingh Lila, Bawan Dvadashi and Holi, to receive the offerings on such occasions, to realize subscriptions in respect of them, and for a perpetual injunction restraining the defendant from interfering in any way with the plaintiff's right to perform these pageants and from receiving subscriptions and offerings and taking any income from the said pageants.

(2) There was a further prayer for the recovery of Rs. 20, which, it was alleged the defendant had without any right received from certain persons in connection with the pageant

"In the plaint it was alleged that the plaintiff with his ancestors had always arranged and performed these pageants; that the money realized from subscriptions and offerings was in the first instance used towards meeting expenses, and the balance, if any, was the perquisite of the plaintiff and his ancestors, that in the aforesaid pageants, recitations are given of the Ramayan, those have always been under the supervision of the plaintiff and of his ancestors, that one Dina Nath used to act as *Vyas* or reader at these recitations and

made at them; that Dina Nath

occasionally from the defendant,

-m to interfere in the pageants to

act contrary to the wishes of persons who come to see them and has been setting up a claim to be the proprietor of the Chittrakoot Ram Lila, that he in a similar manner interferes with the Narsingh Lila, Bawan Dvadashi and the Holi—all of which pageants have been for centuries exclusively managed by the plaintiff and his ancestors

"In defence it is urged that the pageants are performed on behalf and by the aid of all the Hindu community. It is denied that Dina Nath *Vyas* was a reader with power of passing on and devising the duties of *Vyas* to his descendants.

"The defendant denies interference with the realization of subscriptions It is also added that the claim is not cognizable by a Civil Court, and if cognizable, is barred for want of sanction under section 539.

"The defendant further alleges that he was appointed *Vyas* of the pageant during the time of Mahant Rampi Das with the consent and permission of the

(1) (1895) I. L. R, 19 Mad, 62 (2) (1888) I. L. R., 11 Mad., 450.
(3) (1862) S D. A, N.-W. P., 314.

towards its maintenance and conduct are voluntary subscriptions No person is under any compulsion of any kind to subscribe, and it is perfectly within the power of any individual to organise and carry out a similar pageant or procession. In support of this contention the respondent puts forward the case of *Barsati* v *Chamru* (1) In that case the plaintiffs sued for a declaration that they were the Chaudhris of certain bazars, that the defendants were not the Chaudhris of the said bazars and not entitled to take Chaudhris' dues In that case, as in the present, the plaintiffs asked for an injunction restraining the defendant from offering obstruction to the plaintiffs taking their dues and realizing dues themselves In that case, as in the present, the fees paid to the Chaudhris were voluntary payments, and it was held that the plaintiffs had no right which could be enforced by a suit in the Civil Court. For these reasons and on the same principle it is urged that the present suit should stand dismissed

"I was also referred to the case of *Beharee Lall* v *Baboo* (2) This case adopted the law laid down in *Hur Lall* v *Jeorakhan Lall* (3) The principle laid down as to whether a suit of this nature was or was not cognizable, was based entirely on the nature of the offerings sued for 'The distinction between offerings on festive or other occasions and of offerings at shrines and temples should' the judges observe, 'be carefully looked to in cases of this kind The successive decisions of this, and the Presidency Courts, carefully observe the distinction referred to, ruling that for the former description of cases, a suit in Civil Court will not lie while for the latter it will'

The offerings made to a family priest by his employers according to the learned judges should not be subject matter for a suit cognizable by the Civil Courts but a suit for the right to offerings collected at a shrine or temple from worshippers or pilgrims would be a suit cognizable by the Civil Court

It was in consequence of this argument that I referred to the court below the issue upon which findings have now been returned If no other point arose for consideration in this case I should find it difficult to distinguish the present case from those already quoted But it seems to me that we have in this suit to remember that while the plaintiff is on the one hand suing for a declaration that he has a right to perform and to conduct these pageants and to receive the offerings thereof he is also asking for an injunction restraining the defendant from interfering in any way with his rights in the conduct of these pageants The suit is not one for a declaration that he is entitled to recover fees or subscriptions from persons whether they are willing or unwilling to pay such fees and subscriptions

'This was the main point in the case of *Barsati* v *Chamru* (1) and in the other rulings already cited Now, as I understand the plaintiff his suit is on the one hand a suit by one who claims to be the holder of a dignity for the enjoyment of the rights and privileges attached to that dignity, together incidentally with the offerings made by willing persons to him as the person who hold that office of dignity.

(1) (1907) I L R 29 All, 683 (2) (1867) N W P, H C Rep., 80.
(3) [illegible] N W P [illegible] 314

pretence for treating with levity the marks of distinction conferred by the sovereign authority and highly valued in the East, such as the right to wear a particular button, to use a fan made from a cow's tail or to be carried crossways in a palanquin'

"It is true that in the present case the appellant does not allege that the dignity rests upon any grant made by a sovereign power and therein his case differs from the precedent just cited, but the observations quoted have this value that they set out the principle upon which such actions fall or do not fall within the cognizance of the Civil Courts. The words contained in section 11 of the Code of Civil Procedure, 1882, appear to me ample enough to include the present suit.

"There is nothing to limit the word 'office' contained in the explanation to section 11 to an office established only by the Crown or by Statute. Many a Mahant holds the office of Mahant not by virtue of a specific grant conferred upon him by the ruling power, but owing to his election or elevation to that dignity by the votes of others or by virtue of some long subsisting custom. Here it has been found that the right to conduct the Chittrakoot Ram Lila has, by the Hindu public of Benares, been reposed in the hands of the plaintiff and his predecessors for some generations back. It may be that the Hindu public who repose this trust in this particular line of succession may have the power of diverting it but for the present the plaintiff holds the office and his suit is a suit in which the right to that office is contested.

'In *Dina Nath Chuckerbutty* v. *Pratap Chandra Goswami* (1) a suit for the declaration and enforcement of an hereditary right to officiate as priest at the worship performed by votaries at the foot of a certain tree, and also to have a share in the offerings made to the deity, was held to be clearly maintainable The right asked in that case was not said to be based upon any grant derived from the sovereign power

"On the other hand the Bombay High Court in *Narsin Vithe Parab* v *Krishnaji Sadashiv* (2) held that a suit claiming the right to be the first to worship the deity on certain occasions and to receive gifts of rice, cocoanut, &c, being a suit for mere dignities and unaccompanied with emoluments was not cognizable by a Civil Court.

'In the opinion of the learned Judges who decided the latter case, the trifling gifts were merely symbols of recognition and marks of respect and could not be regarded as emoluments

"I do not think that in the present case it can be said that the subscriptions voluntary though they are are mere symbols of recognition and marks of respect. They are apparently of a more substantial nature than that The plaint which sets out only those subscriptions which the defendant is said to have taken, puts those subscriptions at Rs 20 The amount was not challenged in the defence All that was challenged was the plaintiff's right to recover it from the defendant It may safely then be held that the offerings which go on the occasion of the Chittrakoot Ram Lila to the plaintiff are of more value than Rs 20 and are substantial, and although they are not connected with any particular shrine, the

(1) (1899) I. L. R 27 Calc, 30. (2) (1885) I. L. R, 10 Bom., 233.

He relied on *Madhusudan Parvat* v *Shri Shankaracharya Swami* (1), *Barsati* v *Chamru* (2), *Hur Lall* v *Jeorakhan Lall* (3), *Tholappala Charlu* v *Venkata Charlu* (4), *Subbiraya Mudaliar* v *Vedantachariar* (5), *Narayan Vithe Parab* v *Krishnaji Sadashiv* (6) and *Loke Nath Misra*, v *Dasrathi Tewari* (7)

The ruling in *Dino Nath Chuckerbutty* v *Pratap Chandra Goswami* (8) relied on by the Hon'ble single Judge was not applicable inasmuch as the suit there related to a shrine There was a distinction to be made between personal and local offices Woodroffe and Ameer Ali *Civil Procedure*, 85

Dr *Tej Bahadur Sapru*, (with him Munshi *Gokul Prasad*) for the respondents —

The question was whether the suit was of a civil nature within the meaning of section 9 of the Civil Procedure Code The suit related to an office and the emoluments of that office The plaintiff held the office of the manager of the pageant, and his ancestors held that office before him He had a legal right vested in him It was not merely a question of voluntary payments The very fact of there being emoluments brought it within section 9

The plaintiff did *not object* to the defendant holding an independent pageant of his own Ram Lila was a religious procession Persons who went there made offerings to persons representing the original historical personages But for the offerings the procession would not take place The position of the Mahant was that of an officer An office did not mean an office created by the Crown or by Statute or by some constituted authority Any section of the public could create an office Only two things have to be proved under section 9, *viz*, that there is (i) a right to property, or (ii) a right to an office The present suit did come under the second head "Office" is a very comprehensive term, see Webster's Dictionary The public could restrain him from doing anything inconsistent with the duties of his office

(1) (1903) I. L. R. 33 Bom. 278
(2) (1907) I L R. 29 All 683
(3) (1862) S D A N W P, 314
(4) (1895) I L R. 19 Mad 62.
(5) (1895) I L R., 23 Mad., 23
(6) (1885) I L. R. 10 Bom. 233
(7) (1905) I L R 32 Calc., 1072
(8) (1899) I L. R. 27 Calc., 30

direction of the officers of the district, managed the *Ram Lila*, and that the plaintiff has no right to interfere with him in that office.

The court of first instance granted the plaintiff a perpetual injunction as claimed and dismissed the rest of the plaintiff's claim

On appeal the District Judge modified the decree of the court below, giving an injunction to the plaintiff, prohibiting the defendant from receiving, collecting or using any subscription or offering at the *Ram Lila* and from interfering in its management except under the order and with the consent of the plaintiff, but declaring that the defendant should remain the *Vyas* of the *Lila*, receiving the perquisites he had hitherto been receiving as such

From this decree a second appeal was preferred The learned Judge who heard it before deciding the appeal referred two issues to the lower appellate court for determination, namely —

(1) Whether any portion of the recitation of the *Ramayan*, which is done under the direction of the *Vyas*, takes place in any temple or any shrine?

(2) Whether the subscriptions and offerings said to be taken in connection with the *Ram Lila* in question are taken at or in connection with any temple or shrine; and, if so, what temple or shrine?

The answers to both these questions were in the negative The learned Judge of this Court set aside the decree of the lower appellate court and restored the decree of the court of first instance He referred to a number of authorities, including the case of *Beharee Lall* v. *Baboo* (1), in which the law as laid down in *Hur Lall* v *Jeorakhan Lall* (2), was adopted, and observed that the principle enunciated in that case as to whether a suit of this nature was or was not cognizable by a Civil Court was based entirely on the nature of the offerings sued for, and he quoted the following language of the Judges, viz —"The distinction between offerings on festive or other occasions and offerings at shrines and temples should be carefully looked to in cases of this kind. The successive decisions of this and the presidency Courts observe the

(1) (1867) N.-W P., H C Rep, 80 (2) (1852) S D A., N W. P., 311

his maternal uncle Jamna Prasad died during the pendency of the suit, and it is now carried on under the guardianship of one Gulab Das As we have pointed out, the pageants in question are not connected with any shrine or temple or locality They are merely processions through the streets of Benares at which religious writings are recited The e pageants were carried out by the father, grandfather and great grandfather of the plaintiff who collected subscriptions for the purpose and received offerings They were under no obligations to organize or carry them out but did so voluntarily defraying themselves the initial cost and appropriating to their own use any balance of subscriptions and offerings which might remain after satisfying all expenses The organization of the pageants is purely optional There is no duty or obligation cast upon anybody to organize them It is admitted that the Hindu community is entitled to subsidize any person it may please to carry out these pageants, and it is clear that if they are to be organized in the future, some person other than the plaintiff who is a youth of ten years must undertake the work Under such circumstances it is difficult to understand how the plaintiff can maintain a suit for the declaration and injunction which he has claimed He holds no office and he is entitled to no emoluments No doubt, in view of the fact that his ancestors before him have for many years conducted the pageants, if he were of full age and capable of organizing and conducting them the Hindu community of Benares might be disposed to give their subscriptions and offerings to him in preference to any other member of the community, but there is nothing to compel them to do so Moreover, he is under no obligation whatsoever to undertake any responsibility in the matter of pageants It is quite possible that the Hindu community, who are not represented in this litigation, may under the circumstances, wish the *Lila* to be organized and conducted by the defendant appellant In view of his services in the past they may consider him a suitable person to carry it out, or at least take part in it But if the injunction which has been granted be allowed to stand, he would be precluded from acceding to such wish on the part of the Hindu community This appears to be most unreasonable

plaintiffs stated they were entitled. It was found that there was no shrine or place where a man had a real or even supposed right to collect, and that therefore there was nothing tangible, as there might be in the case of a shrine, and that the suit was not cognizable by a Civil Court. In the judgement the learned Judges observe:—"We have only therefore to determine whether this suit is of a personal nature, as relating to offerings made to a family priest by his employers, in which case it would not be cognizable by the Civil Courts, or whether it is a suit for the right to offerings collected at a shrine or temple from worshippers or pilgrims." Applying that test, they had no hesitation in deciding that the offerings were of a personal nature and quite irrespective of any shrine, temple or the like, and consequently that the case was not cognizable by a Civil Court.

After full consideration of the case we are unable to agree with the learned judge of this Court and with the lower court in the view of this question which commended itself to them. The plaintiff in our judgement holds no office whatever such as is contemplated by section 9 of the Code of Civil Procedure. He is not entitled to any emoluments in connection with the *Lila*, and the pageants are not held in connection with any shrine or temple or sacred spot. We therefore allow the appeal. We set aside the decree of the learned Judge of this Court and also the decrees of the courts below and dismiss the plaintiff's suit with costs in all courts.

*Appeal decreed.*

relationship, but where the one is further removed than the other, the nearer succeeds Manu, Chap IX, v, 187 The earliest texts of the Hindu Law are very general We have to see what interpretations have been placed upon them by the Mitakshara Among the brothers preference is given to whole blood In the case of nephews and brothers the former have a right on failure of the latter The brothers referred to may be of the whole or half blood Manu, Chap II, section 5, pl 1—5 After the parents and their descendants are exhausted, come the paternal grandfather and his descendants, the uncles and their sons successively After Bahadur's death the property would have gone to Mihin Lal and after his death to his sons, among whom only Raja Ram was alive at the time the succession opened According to the Bombay High Court the question of the whole or half blood does not arise in the succession of *gotrajas* The Punjab Chief Court, too, has taken the same view It is for the other side to show that notwithstanding the clear terms of the Mitakshara the nephews are entitled to succeed Other text writers have put the same interpretation on the Mitakshara as I do Reference was made to Viramitrodaya p 199, Smriti Chandrika, Sarvadhikari's Togore Lectures, 1880, p 436 also to *Ganga Sahai* v *Lekhraj Singh* (1) At page 439 of Sarvadhikari's Tagore Lectures is a translation of *Madana Parijata* The rule is that one must find out the nearest heir

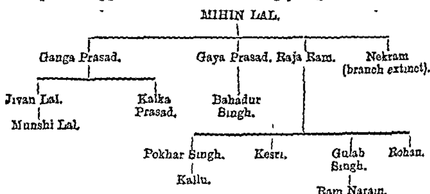
The following authorities were also cited —

Mandlik, *Vyavahara Mayukha* (Translation of Parijata), pp 384 385 Sarvadhikari, *op cit*, p 481 (translation of Nanda Pandit's Vaijayanti), Subodhini, translated by Mandlik, *op cit*, 360 361, Shama Churn Sircar, *Vyavastha Chandrika*, Vol I, pages 172, 177, 182, West and Buhler, Digest p 114, *Ghose, Hindu Law*, p 125, Mayne, *Hindu Law*, 774, 777 (7th edn)

There is no case directly in point The only case in this Court is that of *Suba Singh* v *Sirafraz Kunwar* (2) In that case all the parties were of the same degree of relationship to the deceased *Vithalrao Krishna Vinchurkar* v *Ramrao Krishna Vinchurkar* (3) and *Hira Nand* v *Maya Das* (4) were also referred to

(1) (1886) I. L. R. 9 All., 253
(2) (1896) I. L. R., 19 All. 215
(3) (1899) I. L. R. 24 Bom., 317.
(4) Punj Rec., 1894 231

be the next heirs to Bahadur Singh. The relationship between the parties appears from the following pedigree:—




It is admitted that the four sons of Mihin Lal were separate and that after the death of Bahadur Singh, his widow, Musammat Lachman Kunwar, succeeded to his property. When Lachman Kunwar died, Raja Ram, Jivan Lal and Kalka Prasad were alive, as also was Musammat Gulab Kunwar, the step-mother of Bahadur Singh. She was admittedly not an heir to Bahadur Singh. The question is whether Raja Ram was his heir or whether Jivan Lal and Kalka Prasad inherited his property. Raja Ram and Jivan Lal died subsequently. The property in dispute is claimed on the one hand by the sons of Raja Ram, and on the other by Kalka Prasad and by Munshi Lal, the son of Jivan Lal. There was a controversy as to whether Raja Ram was the half brother of Gaya Prasad, the father of Bahadur Singh or his uterine brother, but the case has been argued on the assumption that he was Gaya Prasad's half brother. It is admitted that Gaya Prasad and Ganga Prasad were born of the same mother. The question therefore is whether an uncle of the half blood succeeds in preference to the sons of an uncle of the whole blood. If Raja Ram was entitled to Bahadur Singh's estate in preference to the sons of Ganga Prasad, his sons are entitled to the property in question and their claim must succeed.

The question raised in this appeal was not decided in *Subba Singh* v. *Sarafraz Kunwar* (1) and the court below is wrong in thinking that it was decided in that case. What was held in that case was that "among *sapindas* of the same degree of

(1) (1896) I. L. R., 19 All., 215.

them, their sons The son of the paternal uncle thus comes in after the paternal uncle whether he is of the whole blood or the half blood. As we have seen, a brother of the half blood excludes the son of a brother of the whole blood On the same principle, which is that of propinquity, a paternal uncle of the half blood excludes the son of a paternal uncle of the whole blood The learned advocate for the respondents contends that paragraph 4, section 5, is intended to apply only to relations of the whole blood, but there is no authority, as far as we are aware, in support of this contention, and none has been cited On the contrary, the Madana Parijata by Visvesvar Bhatta, a commentary on the Mitakshara of great authority, clearly explains what the meaning of the rule is The passage in the Madana Parijata bearing on the point is thus translated by Professor Sarvadhikari in the Tagore Law Lectures for 1880, p 440 —"Among the paternal uncles the succession of uterine and half blood uncles should be regulated in the same manner as in the case of brothers, that is, the paternal grandmother's sons first inherit, and after them the step grandmother's sons, and in their default the paternal uncles' sons inherit in the same manner as brothers' sons." The same passage is quoted in Mandlik's Hindu Law, p 384, foot note, and is similarly translated Reading the text of the Mitakshara by the light of this commentary there can be no room for doubt that an uncle of the half blood succeeds in preference to the son of an uncle of the whole blood, the former being nearer in propinquity than the latter

As Raja Ram was alive when the widow of Bahadur Singh died, he inherited the latter's property, as he was Bahadur Singh's uncle, although of the half blood, and the plaintiffs respondents, who are lower in degree, have no right to his estate Their suit ought, therefore, to have been dismissed and the claim of the sons of Raja Ram ought to have been decreed I would allow this appeal, set aside the decree of the court below and dismiss the suit of the plaintiffs respondents with costs

KNOX, J —I have had the advantage of reading and considering the judgement of my brother BANERJI and have nothing to add.

RICHARDS, J.—I concur.

vent —(*a*) production of fraudulent memoranda of accounts before the receiver, (*b*) fraudulent disposal of assets shown in the first petition, (*c*) suppression of account books, and (*d*) act of bad faith in suppressing the first petition, which he was called on to produce before the order of adjudication had been made The Judge dealt with these charges mainly upon the evidence which was taken on the occasion of the adjudication of insolvency, and sentenced the insolvent by his order, dated the 2nd of September, 1909 to six weeks' simple imprisonment The insolvent preferred this appeal to the High Court under section 46 (2) of Act III of 1907

Babu *Lalit Mohan Banerji*, for the appellant, contended that the sentence was based mainly on the evidence that was given on the side of the creditors when they were opposing the application for adjudication That evidence was produced about six months before the proceedings under *section* 43 (2) were taken. The purposes of the two proceedings were *distinct* and the evidence given in the one could not properly be made *the basis* of the order in the other In the later proceedings, when the charges were framed by the Judge, the correct procedure should have been for him to take fresh evidence and adjudicate upon the different charges on that evidence alone The appellant had no opportunity of cross examining the witnesses with a view to his meeting the charges now brought against him, for he could not then anticipate what future charges would be brought against him Under these circumstances the order imposing a sentence was illegal *In the matter of Rash Behari Roy* (1)

Mr *W Wallach* (Government Advocate) for the respondent, conceded that the proof of the four charges was based mainly on the evidence that was taken at the time of the adjudication of insolvency although he contended, at least one of the charges was fully established by additional evidence taken in connection with the present proceedings It would be more satisfactory if fresh evidence were taken on all the charges framed and the sentence based on such evidence

Babu *Lalit Mohan Banerji*, replied that the additional evidence which had been taken, did not by itself fully establish any one of the charges

(1) (1889) I. L. R., 17 Calc., 209

the nature of a penalty and that the insolvent could not be convicted unless he was shown by legal evidence to have committed an offence on some specific occasion. It is no doubt true that in the present case the evidence was taken in the presence of Nathu Mal and he had an opportunity of cross-examining the witnesses. On the other hand at that time there was no charge against him of having committed any offence under section 43 of the Provincial Insolvency Act. It may well be that the cross-examination would have been different if Nathu Mal had known that the evidence was being recorded as the foundation for a sentence under section 43. We think that Nathu Mal may well have been prejudiced. The learned Judge, as we have already pointed out was prepared to make and actually did make an order of adjudication, notwithstanding the evidence adduced by the creditors and no action was taken by the learned Judge at that time, and it was not until after the receiver's report that the present proceedings were instituted. It cannot be disputed that the order of imprisonment is mainly based on the evidence that was taken on the first occasion The only question which we have any doubt about is whether or not we should send the case back for a decision *de novo* While we quite agree with the remarks of the learned Judge that insolvents acting in a fraudulent manner and committing offences under section 43 should certainly be punished, we do not think under the circumstances that it would be in the interests of public justice that we should send the case back. Of course our order will not affect in any way the discretion of the court below as to withholding the order of discharge. We accordingly allow the appeal, set aside the order of the learned District Judge, dated the 2nd of September, 1909. The applicant will bear his own costs. The bail order is discharged.

*Appeal allowed.*

If a Muhammadan widow, with the consent of the heirs of her husband gets into possession, she acquires a lien over the property and cannot be dispossessed till her dower debt is paid: *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (1). There is nothing in the judgement of their Lordships of the Privy Council to show that the lien is not claimable by the heirs also If the widow has a lien, she can transfer the lien along with her debt, and there is no reason why her right should not be inherited by her heirs.

He cited *Mahomed Uesudoollah Khan* v. *Ghasheea Bebee* (2), *Kummur ool nissa* v. *Mahomed Hussun* (3), *Mussumat Ghufoorun Bebee* v *Khwajeh Mustukedeh* (4), *Ali Muhammad Khan* v. *Azizullah Khan* (5), *Azizullah Khan* v. *Ahmad Ali Khan* (6), *Amanat-un-nissa* v. *Bashir-un-nissa* (7), *Ajuba Begam* v. *Nazir Ahmad* (8), *Muzaffar Ali Khan* v *Parbati* (9), *Syud Bazayet Hossein* v. *Dooli Chund* (10) and *Hadi Ali* v *Akbar Ali* (11).

Dr. *Tej Bahadur Sapru* (with him Babu *Harendra Krishna Mukerji*), for the respondents, contended that their Lordships of the Privy Council did not use the word lien in the sense in which it is understood in English law or Indian Statute law. The security of the property was simply given by way of facility and the user was limited to the widow personally She was simply put into possession "as such widow." He further submitted that the later Allahabad cases were all in favour of his contention He then discussed the authorities cited by the appellant and cited *Mussamut Wahid-un-nissa* v. *Mussamut Shubrattun* (12) and *Syud Bazayet Hossein* v *Dooli Chund*, (13).

Maulvi *Muhammad Ishaq* was not called upon in reply, but he referred to *Bhola Nath* v *Maqbul-un nissa* (14)

TUDBALL, J —The sole question for decision in this appeal is whether the heirs of a Muhammadan widow, who has lawfully obtained possession of her husband's estate in lieu of her dower

(1) (1871) 14 Moo I A, 377 (383)
(2) (1866) 1 Agra 150
(3) (1866) 1 Agra, 287 (290)
(4) (1867) 2 Agra 300
(5) (1883) I. L. R. 6 All, 50
(6) (1885) I L. R, 7 All., 353.
(7) (1895) I. L. R., 17 All, 77 (80)
(8) Weekly Notes 1890, p 115
(9) (1907) I. L. R., 29 All, 640
(10) (1878) I L R., 4 Calc, 402
(11) (1898) I L R., 20 All., 262
(12) (1870) 6 B L. R 54 (55).
(13) (1878) L. R., 5 I. A, 211, I. L. R., 4 Calc 402
(14) (1903) I. L. R., 26 All., 28, (34).

the heirs She is of course liable to account to the heirs for the profits thereof This is also clearly laid down by their Lordships of the Privy Council in the case of *Mussumat Bebee Bachun* v *Hamid Hossein* (1) The solution of the question before us however, necessitates the ascertaining of the true nature of the widow's possession, when she thus lawfully takes her husband's estate into her hands Is it a mere personal right to retain possession for her own lifetime only subject to payment of the balance of the dower debt at any time before her death, or is it a right to possession which continues to her heirs after her death, subject to the conditions as to payment? In the case of *Amanat-un nissa* v *Bashir-un-nissa* (2) it was held that a Muhammadan widow is "lawfully" in such possession where she has obtained it by contract with her husband, by his putting her into possession or by her being allowed with the consent of the heirs on his death to take possession (in lieu of dower) and thus to obtain a *lien* for her dower debt Though I do not perhaps accept this definition as a correct interpretation of the word 'lawfully" as used by their Lordships of the Privy Council in their judgement in the case of *Bebee Bachun* v *Hamid Hossein*, still, even from this, it would seem to follow that the property is in her hands a security for the debt due to her, and in the absence of contract or circumstances pointing to the contrary she would in law have a right to transfer her debt together with its security, and her heirs would be entitled to inherit both As to the nature of the widow's possession it was laid down in *Mahomed Usudoollah Khan* v. *Mussumat Ghasheea Bebee* (3) that she was temporarily in possession as a security for the payment of her dower claim That was a case in which the widow had alienated the property itself, and it was held that the heirs could sue to avoid the transfer "It is clear" (runs the judgement) "that they (the heirs) may be entitled to recover possession by payment of the debt, during her lifetime or on her death, and that she is wholly incompetent to make a gift of what, although temporarily in her possession as a security for the payment of her dower claim, does not belong to her but to them" It must be carefully noted that what the

(1) (1871) 14 Moo I. A., 377. (2) (1894) I L. R, 17 All, 77
(3) (1866) 1 Agra, 150

*dower*" to hold the property of her husband of which she has lawfully and without force or fraud obtained possession until her debt is satisfied with the liability to account to those entitled to the property the subject of the claim, for the profits received Their Lordships, while not deeming it necessary themselves to define the right of the widow in possession, point out that it had been held to be a lien in the strict sense of the word In this case it is worthy of note that the widow took possession without the consent of the other heirs.

In the case of *Syud Bazayet Hossein* v. *Dooli Chund* (1) the report shows that the High Court (PHEAR and AINSLIE, JJ.) remarked as follows:—"No doubt if she is in possession of the property she is entitled to assert a "*lien*" upon it in respect of her own debt against the other heirs and to pay herself her own debt before she pays the debt of any one else" In the case of *Aziz ullah Khan* v *Ahmad Ali Khan* (2), it was held by a Bench of this Court (OLDFIELD and MAHMOOD, JJ), that the heirs of the widow in possession in lieu of dower succeeded to her estate, including the dower debt, and, as such, were entitled to continue in possession of the deceased husband's property like the widow, until the dower debt was satisfied. The case is parallel to the one now before us and is a ruling in point. This judgement was delivered by Mr Justice MAHMOOD It is a clear ruling to the effect that the widow's right to retain possession is at least heritable

On behalf of the respondent it is urged that the widow's right to possession is purely a personal right and that it ceases on her death The argument has not been based on any principle or rule of Muhammadan Law, but reliance is placed on certain rulings.

In *Ali Muhammad Khan* v. *Aziz ullah Khan* (3) it was remarked in the judgement:—"The *right to dower is personal to herself* and does not pass to a purchaser of the estate, for dower stands on no higher footing than any other debt" Then, quoting from the judgement of the Privy Council in *Bebee Bachun* v. *Hamid Hossein* noted above, the Officiating Chief Justice

(1) (1878) L. R., 5 I. A., 211; I. L. R., 4 Calc., 404.
(2) (1885) I. L. R., 7 All., 353.
(3) (1883) I. L. R., 6 All., 50.

her husband. In respect to the decision in *Ali Muhammad Khan* v. *Aziz ullah Khan* (1), Mr Justice MAHMOOD remarked — "I may say that I agree in the general effect of the ruling although I may not be prepared to adopt every step of the reasoning upon which the ruling proceeds It is important to point out that in that case although the property had been sold by the widow there was nothing to show that she had also conveyed to the vendee her right of dower." Attention was called to the learned Judge's own judgement in *Aziz-ullah Khan* v *Ahmad Ali Khan* noted above, and he pointed out that there was nothing inconsistent between the two rulings, and that the position of the heirs succeeding to the estate of a Muhammadan widow was very different to that of a purchaser from her of an isolated bit of her husband's estate The latter (the purchaser), he pointed out, was not her representative for her claim to dower, because it is a money claim "*by itself.*"

The decision in I. L. R, 6 All, 50 does not advance the respondent's argument in any way whatever It does not establish that the right to retain possession lawfully obtained is a *personal* right which ceases on her death and is not transferable

The case of *Hadi Ali* v *Akbar Ali* (2) does, however, in some degree support the respondent's contention. The facts were as follows — One Karim Bakhsh died, leaving a widow and three daughters a nephew (son of his brother) and a daughter's son, Hadi Ali. The widow took possession of the estate in lieu of dower and then gifted a portion of it to Hadi Ali. The nephew thereupon sued to obtain possession of his share in the estate as against the widow and Hadi Ali

The Court of first instance decreed the claim The widow and Hadi Ali both appealed in respect to the portions of the estate in their separate possession Pending the appeal the widow died and her heirs not being brought on the record her appeal abated. Hadi Ali's appeal was decreed. On second appeal to this Court a single Judge ruled as follows —"As regards the property which is the subject of the alleged gift to Hadi Ali, the lower appellate Court has found that Huran Bibi was in possession of it in lieu of dower She was not entitled to transfer that property by way

(1) (1883) I. L. R., 6 All, 50 (2) (1893) I. L. R., 20 All., 262

the widow's right to the dower debt, nor of her right to continue in possession until that debt was paid The widow had simply given to him property which did not belong to her, over and above her share inherited from her husband There is one other case on which the arguments for the respondents have been based *Muzaffar Ali Khan* v *Parbati* (1) The decision of the Privy Council in *Bebee Bachun* v *Hamid Hossein* is mentioned in the judgement and the passage quoted above was also quoted The learned Judges then remarked :—"It will be seen that this is a much stronger case than the one before us The lady was in actual and lawful possession (a status to which Musammat Ashraf-un-nissa, it is admitted, never attained, possession having remained all along with the mortgagees) and yet the utmost right assigned to her is that of a creditor to hold certain property until her debt is satisfied, with the liability to account to those entitled to the property. *Such a right could never be transferable It is nothing more than an interest in property restricted in its enjoyment to the owner personally* and the transfer of any such right is prohibited by section 6, clause *(d)* of the Transfer of Property Act IV of 1882 Furthermore we have held in this Court that such rights are neither transferable nor heritable See the decision in *Hadi Ali* v *Akbar Ali*" In the first place, as the above quotation itself shows the widow in *this case* was not and never had been in possession at all of the *estate* in question That had remained all along with the mortgagees to whom *the husband* had given possession It was, therefore, hardly necessary for the purposes of the case to decide the question of the nature of the possession of a Muhammadan widow, lawfully obtained in lieu of dower In the next place, it is based on the ruling in *Hadi Ali* v *Akbar Ali*, which has already been discussed Thirdly, no reason beyond this ruling is given for holding that such a right could not be transferable and is nothing more than an interest "in property restricted in its enjoyment to the owner personally" Neither Mr Justice MAHMOOD's decision in I L R, 7 All, 353 nor any of the older rulings are mentioned or discussed either in this judgement or in that of *Hadi Ali* v *Akbar Ali* No grounds are given for holding that the enjoyment of this right to continue

(1) (1907) I L R, 29 All, 640

1910

Ali Bakhsh v. Allahdad Khan

and I fully agree with the ruling of OLDFIELD and MAHMOOD, JJ., in *Aziz ullah Khan* v. *Ahmad Ali Khan*(1). I would, therefore, admit the appeal.

RICHARDS, J.—I concur. Their Lordships of the Privy Council in the case of *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* have laid down that a Muhammadan widow entitled to dower who has lawfully and without force or fraud obtained possession of her husband's property, is entitled to retain possession until her dower debt is satisfied, subject to her liability to account for the profits received. If the widow has such a right, I can see no reason why it should not descend to her heirs. The meaning of the expression "lawfully in possession" in their Lordships' judgement does not clearly appear. In the case of *Amanat-un-nissa* v. *Bashir un nissa*(2) the following passage occurs:—"If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband by his putting her into possession or by her being allowed with the consent of the heirs on his death to take possession in lieu of dower and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession adversely to the other heirs." I think that a perusal of the report of the case *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* negatives the assumption that a Muhammadan widow cannot be "lawfully in possession" unless by contract with her husband or with the consent of the heirs. I do not understand how such a widow can be said to obtain a "lien" by contract. If the widow's right is only by virtue of a contract with her husband or with the other heirs, her right must be limited entirely by the terms of the contract. It is not a lien. In my opinion where a Muhammadan widow entitled to dower gets quietly and peacefully into possession without fraud, she is entitled to retain possession until her dower debt is paid, subject to (as their Lordships have laid down) her liability to account for the profits received. I am also of opinion that if the widow, being so in possession, dies, her right descends to her heirs.

BY THE COURT.—The appeal is allowed, the decrees of the courts below are set aside, and the case is remanded through

(1) (1885) I. L. R., 7 All., 353. (2) (1894) I. L. R., 17 All., 77.

estate. The defendant, Musammat Asghari Begam, is the widow of the said Gulsher Khan. The latter pleaded that she was in possession of her deceased husband's property; that her dower debt remained undischarged, and she claimed to remain in possession until the dower debt was discharged. The lower appellate court has found that the defendant's dower debt is Rs. 5,000, and it remains undischarged. It gave the plaintiff a decree conditional upon his paying the sum of Rs. 5,000. The plaintiff appeals and claims that he is entitled to possession, notwithstanding that the dower debt remains undischarged. He relies upon the fact that when the defendant applied for mutation of names, she merely claimed mutation as sole heir of her deceased husband and that therefore she was not lawfully in possession in such a way as to entitle her to maintain possession until her dower debt was paid.

The lower appellate court says in the course of its judgement:—"The mutation proceedings commenced within a very few months of the death of Gulsher Khan, and I am not shown anything to the effect that it was ever even alleged that the lady had taken possession without the consent of the other heirs. On the other hand one of the plaintiffs expressly acquiesced in her possession and her claims. Thus the plaintiffs have failed to discharge the burden which lay upon them to prove the unlawfulness of her possession. And in fact, in all probability what happened was that the lady on her husband's death simply continued in possession of the properties, which for all practical purposes she possessed along with him, living with him as his wife, for Rustam Khan in the mutation proceedings spoke of her as having separate possession."

The appellant relies on the ruling in *Amanat-un-nissa* v. *Bashir-un-nissa* (1). In that case the learned Judges, after referring to the case of *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (2), say as follows:—"So far as we are aware neither a Muhammadan widow nor any other creditors can give themselves a lien by taking possession, without the consent or the authority of the person entitled, of property to the possession of which those other persons are entitled. If a Muhammadan

(1) (1894) I. L. R., 17 All., 77. (2) (1871) 14 Moo. I. A., 377.